



THE

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Allahabad Series

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by the Supreme Court of India on appeal therefrom

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JUDGES OF THE HIGH COURT OF JUDICATURE AT
ALLAHABAD

1958

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| An order in regard to a proceeding which relates to determination of individual rights or redress of individual wrongs, is in regard to a civil proceeding within the meaning of the words in Art. 133(1) (b) of the Constitution and leave to appeal to the Supreme Court is to be granted if the judgment under appeal involves directly or indirectly a question respecting property worth not less than Rs.20,000 | |
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In a proceeding under Arts. 226, 309, 310, 311 of the Constitution the jurisdiction of the High Court is not that of an appellate court and it cannot substitute its own order on merits to that of the inferior Tribunal but can only quash the order on the ground that there is mistake of jurisdiction or error of law.

After an order of the High Court quashing the order of an inferior Tribunal, the jurisdiction of the Tribunal does not cease to pass the necessary orders in the proceeding.

In a writ proceeding the High Court will not sit as a Court of Appeal and substitute its own decision for the decision of the inferior Tribunal on the ground that in its opinion the evidence was not sufficient to make out a charge, but, if on the face of the record it is apparent that the trial court has come to a decision on no evidence, it will be a manifest error of law amenable to a writ of certiorari.

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Court of Wards—*Property of both the wards under the superintendence of the Court of Wards—Litigation between wards—Compromise, validity of—U. P. Court of Wards Act, 1912, s. 56, applicability of.*

A First Appeal, no. 99 of 1947, was filed by the Court of Wards representing Rani Drig Raj Kunwar's Estate in Bara Banki against Amar Krishna Narain Singh, who also filed a First Appeal, no. 2 of 1948, in the Chief Court. On 8th February, 1950, the Deputy Commissioner of Bara Banki, assumed superintendence of the property

of Amar Krishna Narain Singh and thus the two warring estate-holders, Rani Drig Raj Kunwar and Amar Krishna Narain Singh, vested in one single hand, namely, that of the Deputy Commissioner of Bara Banki. The estate of Rani Drig Raj Kunwar was called the Ganeshpur Estate and the estate belonging to Amar Krishna Narain Singh was called the Ramnagar Estate. A compromise was arrived at on 25th April, 1952, and the court passed a decree in terms of that compromise. The above appeals were disposed of accordingly. The translation and printing of the record in the above two appeals did not proceed owing to the compromise. Rani Drig Raj Kunwar has now applied for the preparation of the paper book alleging the decrees passed in the above two appeals to be of no effect.

Held, (i) that the position of a ward is not the same as the position of a minor at law and the authorities which lay down that any decree obtained against a minor when such a minor is not properly represented in the suit would be a nullity, would have no application to the case of a decree obtained against a ward if there was any procedural error in regard to representation in the suit under the provisions of the Court of Wards Act ;

(ii) that the real representation of each of the two contesting wards remained vested in the Court of Wards and that the Court of Wards remained the ultimate authority under the law to act on behalf of the wards ;

(iii) that the question whether the compromise was detrimental to the interest of any of the parties to it or not was not a question that could be investigated in these proceedings ; it can only be done by a separate suit ;

(iv) that the mere fact that the compromise has been made in a suit in which representatives for the two contesting wards had not been appointed did not make the compromise unlawful for there is no provision in the Court of Wards Act specifically enjoining that a compromise could be effected between two rival wards only through their appointed representatives and not otherwise ;

(v) that the compromise had been entered into on the one hand on behalf of Rani Drig Raj Kunwar by the Deputy Commissioner in charge of her estate, and on the other, on behalf of Raja Amar Krishna Narain Singh by the Deputy Commissioner in charge of his estate—these must be held to be two legally distinct personalities even though the two happened to vest in the same individual ;

(vi) that there was no failure on the part of the Court of Wards to apply its mind to the question whether the Act is for the benefit of the property or the advantage of the wards or that the action of the Court of Wards was not *bona fide*. An attack on the compromise on the grounds abovementioned can only make the compromise voidable and not void *ab initio*.

Raja Shri Amar Krishna Narain Singh v. Deputy Commissioner, Bara Banki, as manager, Court of Wards, Ganeshpur Estate, Bara Banki

Criminal Procedure Code, 1898, s. 417(1)—*Not ultra vires—Constitution of India, Art. 14—"Person" does not include "State"—Appeal against acquittal—Right given to State—No discrimination—Ex parte order, effect of—Right of private defence, s. 417(1), Criminal Procedure Code, 1898, is not ultra vires of the Constitution.*

The word "person" in Art. 14 of the Constitution does not include "State" as representing the society and the mere fact that the "State" has been given the right of appeal against an appellate order of acquittal under s. 417(1), Criminal Procedure Code, which right has not been given to a private individual, does not create any discrimination under Art. 14 of the Constitution.

An *ex parte* order of a magistrate putting a person in possession of certain property has the same legal effect as an order after contest and no party can ignore it and plead right of private defence in resisting the order.

State v. Shankar

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—————, s. 540—*Calling of fresh evidence after conclusion of arguments—Validity of.*

The court below having called fresh evidence under s. 540, Code of Criminal Procedure, while preparing judgment in a sessions trial, the order was challenged in revision on the ground that the trial had concluded with the arguments and fresh evidence would further amount to "filling loopholes" in the prosecution case.

Held, that "trial" within the meaning of s. 540, Criminal Procedure Code, terminates with the pronouncement of judgment or the charge to the jury in a jury trial; until that stage is reached, fresh evidence can be called under s. 540 for the proper decision of the case. Further s. 540, Criminal Procedure Code, being intended for doing justice in a case "filling of loopholes" is a subsidiary factor and cannot be taken into account. The court in the instant case had jurisdiction to call fresh evidence and the order was rightly made.

Held, further, that s. 540, Criminal Procedure Code, is in two parts and while the first part is discretionary, the second is mandatory and the court is bound to examine fresh evidence under the second part of s. 540, Criminal Procedure Code, if it is essential to the just decision of the case.

Ram Jeet v. State

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Criminal Trial—Identification of the accused, principles of.

Although no hard and fast rules can be laid down for assessing the evidence of identification but some general guiding principles can be stated.

The evidence of identification is as much subject to the word "proved" in s. 3 of the Indian Evidence Act as any other kind of evidence. Although absolute certainty is not needed but the court is to test the evidence with prudence and accept it only when it is so highly

probable that its truth can safely be accepted. The golden rule of prudence is that probable should be preferred to the possible, unless the possible is supported by irreproachable evidence.

The evidence of identification can be accepted only if the court is satisfied on the following points:

- (1) The witness had at least a fair, if not a good opportunity of seeing the dacoits.
- (2) The identification parade was held within a reasonable time of the incident.
- (3) The power of observation of the witness is reliable.
- (4) The statement of the witness that he did not know the suspect from before is believable.
- (5) That the witnesses were not given an opportunity to see the accused after their arrest.

Where the investigation is tainted, the performance of the witness cannot be accepted at its face value for the reasonable possibility of external aid being given to the witness cannot be eliminated.

Held, that a graduated scale of the number of undertrials to be mixed with the suspects would be most desirable. For example, if there are three suspects in a parade, the ratio between the suspects and the undertrials may be reduced to 8 to 1 and this proportion may be decreased progressively when the number of suspects becomes more and more, but in no case, whatever, the number of suspects might be, it should become less than 5 to 1.

Anwar v. State

—, *Sanctioning Authority*—*Sanction under s. 161, Indian Penal Code, but trial also under s. 5(2) of the Prevention of Corruption Act*—*Trial, illegality of*—*Criminal Procedure Code, 1898, 230, scope of.*

Where the sanctioning authority has sanctioned prosecution of the accused only under s. 161, Indian Penal Code, and the trial court tried him also under s. 5(2) of the Prevention of Corruption Act.

Held, that the trial court could do so under the latter half of s. 230, Criminal Procedure Code, and the court was within its rights when it tried the accused under s. 5(2) of the Prevention of Corruption Act unless the accused is in any way prejudiced by the addition of the charge and no irregularity or illegality is committed by the trial court.

Where the offence was committed on the first of November, 1950, more than six years ago and the accused was subject to two, long protracted trials not on account of any delaying tactics adopted by him but because the law was changed and in defending himself the accused had to incur a huge expenditure and the major part of the illegal gratification collected by the accused went to other

pockets, the sentence of fine alone will meet the ends of justice ; the sentence of imprisonment is set aside but the amount of fine is enhanced.

Lauries E. Jacobs v. The Union of India, through Sub-Inspector Lal Chand
 -----, *Special Judge, Anti-Corruption—Termination of Service—Case pending—Evidence, production of—Special Judge's successor, appointment of—Retrial of the case—Criminal Procedure Code, 1898, s. 350, scope of—Criminal Law Amendment Act, 1952, ss. 8 and 9, applicability of.*

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Held, that s. 350, Criminal Procedure Code, is not applicable to the proceedings before the Special Judge appointed under the Criminal Law Amendment Act, no. XLVI of 1952.

M. R. Malhotra v. State

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Dismissal—Sub-Inspector—Police Regulations, para. 486, sub-rule 1, scope of—Writ petition, applicability of.

B. R. Upadhyya, a Sub-Inspector of Police, the applicant, met one Tika Ram who was carrying currency notes in a *potli*. The Sub-Inspector asked Tika Ram to produce the *potli* and he examined and counted the currency notes but they were returned to Tika Ram. Tika Ram on reaching home found that they were short by Rs.250. He made a complaint of the above facts to the Superintendent of Police on 9th September, 1953, and an inquiry was made by the Superintendent of Police and departmental proceedings under s. 7 of the Police Act were taken against the applicant who was dismissed. The applicant has filed this writ petition against the order of dismissal.

Held, that an offence under s. 409, Indian Penal Code, is admittedly a cognizable offence and as the complaint made by Tika Ram was, in respect of a cognizable offence under s. 409, Indian Penal Code, the provisions of Police Regulation 486, sub-paragraph 1, applied to it. No case was registered by the police on the information, received by the Superintendent of Police, nor was any report under s. 157, Criminal Procedure Code, submitted to the District Magistrate or was accepted by him. Departmental action, as laid down in paragraph 490, could be taken only after the final report under s. 173, Criminal Procedure Code, had been accepted by the District Magistrate. No such report as mentioned above was made or accepted by the District Magistrate. An express provision laid down in paragraph 486 of the Police Regulation was ignored and the dismissal was illegal.

Held, further that the order of dismissal was passed as far back as the 19th of October, 1954, and this petition had been pending for over two years and possibly a suit would be time-barred and the relief in this writ petition should not be refused in the present case and the applicant should not be driven to the necessity of filing a regular suit after his petition had been pending for over two years in this Court.

Babu Ram Upadhyya v. The Uttar Pradesh Government ..

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Duty on a Document—Between the seller and buyer of certain timber for a price payable in instalments, which were made a charge on the produce—payable as on a bond under Art. 15, read with Art. 40, Stamp Act

1

Election—*Election Petition—Application for amendment—Dismissal of the petition—Appeal, maintainability of—Corrupt practices, description and specification of—Allegation, vague—Representation of the People Act, 1951, ss. 83(1), cl. b. 90(5), 123 (5), scope of.*

There were three candidates for election for the U. P. Legislative Assembly from the Bahraich (North) 269 Constituency, Syed Zargham Haider, the respondent no. 1, was declared elected.

Madan Lal, a voter filed this election petition before the Election Commissioner which was referred to the Election Tribunal at Gonda. Corrupt practices were enumerated in paras. 4(a) to 4(e) of the election petition. On 27th July, 1957, the respondent no. 1 filed his written statement alleging that paras. 4(a) to 4(e) were vague and were liable to be struck off. On 8th July, 1957, preliminary issues were framed, the main issue being whether the allegations contained in paras. 4(a) to 4(e) were vague and liable to be struck off. On 27th July, 1957, Madan Lal requested the Election Tribunal to make an order directing him to furnish better and further particulars of the corrupt practices contained in paras. 4(a) to 4(e) of the election petition. This application was rejected the same day. On 1st August, 1957, Madan Lal filed an application for amendment of these paragraphs of his petition. This amendment application was rejected by the Election Tribunal. On the 28th August, 1957, the Tribunal heard the parties on the preliminary issues and held that the paras. 4(a) to 4(e) of the petition were liable to be struck off. After deleting these paragraphs the Election Tribunal held that the petition disclosed no cause of action and there was no question of taking further proceedings in the trial. The Tribunal dismissed the petition. The order striking off paras. 4(a) to 4(e) of the petition and the order dismissing the petition was one single composite order passed on 28th August, 1957. Madan Lal, the appellant, filed an appeal against this order to this Court under section 116(A) of the Representation of the People Act.

Held, (i) that the order appealed against is an order under s. 98 of the Representation of the People Act and the Appeal is maintainable ;

(ii) that the allegations of corrupt practices contained in paras. 4(a) to 4(e) of the petition mentioned corrupt practices committed by the respondent no. 1 himself as well as corrupt practices committed by his agents and supporters. So far as corrupt practices alleged to have been committed by the respondent no. 1 himself are concerned, his election can be declared void merely on proof of commission of these corrupt practices. So far as the remaining corrupt practices alleged to have been committed by his agents and supporters are concerned, the appellant is required to allege and provide the further fact that the commission of these corrupt practices has materially affected the result of the

election. There is no allegation in paras. 4(c) to 4(e) that any of these agents and supporters committed the corrupt practices with the consent of the respondent no. 1 or his election agent. In these circumstances all the allegations which have been made in paras. 4(c) to 4(e) of the petition as well as the allegations which appear in the application for amendment moved by the appellant which relate to the commission of these corrupt practices by the agents and supporters of the respondent no. 1 must be ignored. All the pleadings regarding these corrupt practices, become irrelevant because in the absence of the allegations that these corrupt practices had materially affected the result of the election they cannot be grounds for setting aside the election of the respondent no. 1. The result is that the contents of paras. 4(c) to 4(e) can only be examined to the extent that they contain allegations of commission of corrupt practices of the respondent no. 1 alone ;

(iii) that under s. 123(5) of the Representation of the People Act, a corrupt practice is committed not by conveying the voter but by the act of hiring or procuring the conveyance, clause (b) of s. 83(1) requires the setting forth of at least three particulars, viz. (1) the names of the parties alleged to have committed the corrupt practice when the corrupt practice was committed, and (2) the place, and (3) the date of commission of the corrupt practice. In the absence of allegations of these particulars, the corrupt practices alleged are vague and it is not possible for the respondent to meet the allegations made and the Tribunal was justified in striking off the pleadings contained in paras. 4(a) and 4(e) of the petition ;

(iv) that the allegations that the respondent no. 1 used national symbol such as the national flag in the constituency which was prohibited by law is also vague as no particulars are given and Tribunal was right in rejecting this also ;

(v) that where the delay is not such as to disentitle the appellant from seeking the amendment, the amendments or amplifications in the Election petition are to be permitted under s. 90(5) of the Representation of the People Act ;

(vi) that where the appellant wanted to rely on the corrupt practice of making systematic appeal to the Mohammadan electors to vote and to refrain from voting on grounds of community with the sole purpose of exciting their religious susceptibilities and has given sufficient particulars as required by law, it would have been more helpful to the respondent for the purpose of meeting the charge brought against him, but it is not mandatory under s. 83 of the Representation of the People Act for the appellant to reproduce the exact words. The language used in para. 4(c) gives a clear indication of the nature of the appeals that were made.

Madan Lal v. Syed Zargham Haider

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—————, *Election Petition—Treasury Chalan—Head of Account—P—
not scored out—Treasury Chalan validity of—Representation
of the People Act, 1951, s. 19(3), scope of.*

An election petition was filed and it was accompanied by a treasury chalan. The treasury chalan clearly showed that deposit for security for costs was made in the correct head prescribed by the Government of India ; the head is given as:

Central (Civil) Section. P—Deposits and advances—Part II—Deposits not bearing interest—(c) Other Deposits accounts—Civil Deposits Revenue Deposits—Deposits for Election Petitions.

The Election Tribunal dismissed the election petition on the ground that the treasury chalan did not indicate that there had been compliance with the requirements of s. 117 of the Representation of the People Act.

Held, that the treasury chalan filed by the petitioner did show that the necessary deposit as security for costs had been made in favour of the Election Commission and the order of the Election Tribunal was bad in law and was set aside.

Held, further, that although in the treasury chalan on the right hand corner the letter "P" was not scored out, this does not affect the validity of the treasury chalan as a correct head of account had been described which clearly indicated that it was a Central deposit and not a Provincial deposit. The treasury chalan was held to be valid in law.

Krishna Chandra Gupta v. Tambreshwar Prasad

Election petition—its contents—Particulars of corrupt practices to be specified in full, as required in s. 83(1)(b), Representation of the People Act, 1951

Employer—Special contribution payable by, under Chapter V-A of the Employees' State Insurance Act, 1948, as amended by Act LIII of 1951—A valid Tax

Ex parte decree—*Inter alia* against a defendant who did not apply under O. IX, r. 13, Civil Procedure Code, 1908—when can be set aside

Ex parte order—By a Magistrate—Has the same legal effect as an order after contest

"Explanation", under s. 40(4) United Provinces Municipalities Act, 1916, right to, a statutory right—Neither a common law right, nor a right at law—Rules of natural justice not applicable

Hindu Law—Widow, transfer by—Legal necessity—Recitals in deed of transfer—Lapse of time and presumption in favour of necessity—Surrender, essential ingredients of—Reversioners joining in transfer, effect of.

R. S. owner of zamindari property was murdered on 20th January, 1895. His widow J., along with S. S. sole reversioner, sold to G. C. the entire property on 25th January, 1897, for Rs.20,000 to discharge debts amounting to Rs.11,500. The widow J. died on 5th October, 1932. R. S. and B. S., the then reversioners, thereupon sued on 21st January, 1944, the descendants of G.C. for possession over the property and mesne profits, alleging that the sale was not supported by necessity and that L. S. a reversioner existing, had not joined in the said sale.

Held, (i) that there was legal necessity to justify alienation to raise Rs.11,500 only ;

(ii) that the sale itself professed not to raise the entire consideration of Rs.20,000 for legal necessity ;

(iii) that legal necessity cannot be presumed as a matter of law from lapse of time ;

(iv) that mere recitals in the deed of alienation is not sufficient proof; but where direct evidence through lapse of time has disappeared recital acquires importance and presumption should be allowed to fill in the gaps ;

(v) that where the purchaser acts in good faith and after due enquiry and the sale is justified by necessity, he is under no obligation to enquire into the application of the money ;

(vi) that if the property is such as cannot be sold in part, sale of the whole may be justified though legal necessity is for sale of only a part of it ;

(vii) that *L. S.* was not alive on the date of sale and *S. S.* was the sole reversioner ;

(viii) that surrender by a widow must logically be of the entire estate and in favour of the whole body of the next reversioners ;

(ix) that the sole reversioner joining in the execution of a sale of the entire estate by a Hindu widow will as in the instant case confer absolute title upon the vendee regardless of the question of necessity ;

(x) that in every other case, the question of legal necessity will arise, and the only effect of a reversioner joining the widow will be, if at all, to raise a rebuttable, non-conclusive, factual presumption of legal necessity ;

(xi) that the suit must accordingly fail

Richpal Chand v. Richpal Singh

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Fresh Evidence—Calling of, by court under s. 540, Criminal Procedure Code, after conclusion of arguments in a criminal trial—Validity of

52

High Court—Jurisdiction of, with respect to Revision petitions filed under s. 25 Provincial Small Cause Court Act, prior to its amendment by the U. P. Amendment Act of 1957

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Identification—Of the accused in a criminal trial—Principles of

151

Indian Arbitration Act, 1940, s—33—Application to set aside award—Decree on award—No jurisdiction to pass.

No decree on the basis of an award can be passed in a proceeding under s. 33 of the Arbitration Act, 1940, as all that has to be seen there is whether the award deserves to be set aside or to be remitted.

Amod Kumar Verma v. Hari Prasad

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Indian Companies Act, 1913 s. 228—Winding-up—Company—Contract service with Chairman—Contract, if comes to an end—Salary allowable, principle of.

An agreement was entered into between Jwala Bank Ltd., and Jwala Prasad whereby it was agreed that Jwala Prasad shall be the Chairman of the Board of Directors for twenty years certain with a salary of Rs.20,000 per month plus certain allowances. After about ten years the Bank came into liquidation. Jwala Prasad claimed his salary for the remaining period of his contract of service.

Held (per AGARWALA and GURTU, J.J.—UPADHYA, J., dissenting) that Jwala Prasad was not absolutely or unconditionally entitled to claim his full salary from the date the liquidator took charge of the company to the date when the period of the term of his contract with the company would expire but the claim would be evaluated at the date of winding-up under s. 228 of the Indian Companies Act after making a deduction for the fact that he would be free to do any business that he liked or to seek the employment of his choice.

Jawala Prasad v. Jwala Bank Ltd. (in Liq)

Judgment-debtor, if entitled to notice of application for final decree, after the amendment in 1929 of Order XXXIV, r. 13, Civil Procedure Code, 1908

Jurisdiction—of High Court to quash by appropriate writ the order of the appellate tribunal, that is abolished and has gone outside the jurisdiction

—Of High Court with respect to pending revision petitions, filed under s. 25, Provincial Small Cause Court Act, prior to its amendment by the U. P. Amendment Act, 1957

Land Acquisition Act, 1894, s. 18(2), proviso—Limitation—All applications, if governed—Six months period reduced to six weeks, if notice—Constitution of India, Art. 220.

The proviso to s. 18(2) of the Land Acquisition Act, 1894, applies to all applications in all cases to which clause (a) does not apply. The application must be made within six months from the date of the Collector's award, but if that notice is received from the Collector, that period is reduced to six weeks from the date of such receipt, if that period be the shorter.

Harish Chandra Raj Singh v. Deputy Land Acquisition Officer ..

Landlord and Tenant—Garage gate, construction of—Soak-pit construction of—United Provinces Control of Rent and Eviction Act, 1947, s. 7(E), scope of.

Held, where the garage had no gate, fixing a gate would not be keeping the garage or maintaining it in the condition in which it was let out to the tenant by the landlord. It would be adding something new to it.

Held, further that unless it can be specifically proved that there was contract or a custom by which the landlord was bound to repair the soak-pit, he has no liability under the law to repair it.

Ram Krishna Gupta v. Shri Hari Krishna Tandon

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| Lapse of time —If raises presumption in favour of recitals of necessity in deed of transfer by a Hindu widow | 457 |
| Leave to appeal to the Supreme Court —When allowable in a Civil proceeding | 318 |
| Limitation —For an application under s. 81(1), Land Acquisition Act, 1894, by a person interested, who has not accepted the Collector's award—Provided for in the Proviso to sub-s. (2)—interpreted | 84 |
| ———Its starting point, for recovery of property sold by a Mahant—(i) as his private property, or (ii) as Math property .. | 525 |
| Liability of the landlord —to repair, under s. 7(E), United Provinces (Temporary) Control of Rent and Eviction Act, 1947—Scope of determined | 386 |
| Mahant — <i>Transfer—Adverse possession, starting point—Property sold as private property—Limitation—Date of sale—Property sold—as Math property—Cessation of Mahant's interest.</i> | |

Whenever property belonging to the Math is sold in execution of a decree which is on account of a claim against the Mahant personally and not in connexion with the purpose of the Math, or when the property is sold by the Mahant alleging it to be his personal property for purpose not connected with the Math, the date from which adverse possession of the purchaser would begin would be the date of sale and not the date when the transferor-Mahant ceased to be the Mahant of the institution. It is only when the transferor-Mahant transfers the property under a sale-deed alleging it to be the property of the Math and purporting to sell it for the purposes of the Math that the adverse possession would begin after the Mahant ceased to be the head of the institution.

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| Mahant Purshottam Gir v. Mayanand Gir | 525 |
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Mortgagor and Mortgagee—*Suit for recovery of money and foreclosure on the basis of mortgage—Preliminary decree passed—Application for final decree—Service on the judgment-debtor, if essential—Civil Procedure Code, 1908, Order XXXIV, rule 3, (before and after amendment in 1929), scope of—Civil Procedure Code, 1908, Order IX, rule 13 scope of.*

A suit for recovery of money and for foreclosure was filed on the basis of a mortgage deed, dated the 3rd September, 1948, executed by the two defendants. A preliminary decree was passed with the consent of the two defendants on the 3rd September, 1949, with six months time for payment. An application for final decree for foreclosure was made on 18th July, 1950, and notice was served on one of the defendants but no notice was served on the other defendants.

Held, that prior to the amendment in 1929 of Order XXXIV, rule 3, Civil Procedure Code, no notice was necessary to be served on the judgment-debtors as it would not make any difference if the judgment-debtors, were informed that they had not made the payment when the

judgment-debtors knew whether they had or had not made the payment before the date fixed for payment. But after the amendment in Order XXXIV, rule 3, in 1929, a notice should be issued to the judgment-debtors so that they could know that there is an application for final decree and might exercise their right of paying up the decretal amount before the final decree is passed.

Held, also that Order IX, rule 13, provided for the setting aside of a decree against those defendants also who did not make an application for the setting aside of the decree if it appears that the decree is one and indivisible and cannot be set aside against one particular defendant.

Baljit Singh v. Munnu Lal 31

Notice—Of application for final decree, if essential to be served on the judgment-debtor after the amendment in 1929 of Or. XXXIV, r. 13, Civil Procedure Code, 1908 31

Notice of construction—On a plot of land, subject to a housing scheme—if and when due to the Improvement Trust 4

Notified Area Committee—Removal of the Member by the Commissioner after explanation—United Provinces Municipalities Act, 1916, s. 40, sub-s. 4, scope of "Explanation", meaning of.

The District Magistrate, Gonda, under directions from the Commissioner, issued notices to the two members of the Notified Area Committee, Colonelganj, Gonda, under sub-s. 4 of s. 40 of the United Provinces Municipalities Act, asking them to explain within 15 days of the receipt of the notice why they should not be removed from the membership of the Notified Area Committee.

The two members submitted their explanation denying the charges. The Commissioner, afterwards, removed the two members from the membership of the Notified Area Committee. These two members filed a writ petition against the order of the Commissioner.

Held, that an opportunity to explain means an opportunity to the person charged to offer his own reply and account for the allegations made against him. The further right to cross-examine the witnesses or to examine his own witness is not implied in it.

Held, further that the right to explanation under s. 40(4) of the United Provinces Municipalities Act is a statutory right. Such a right is neither a common law right, nor a right at law. The application of the rules, of natural justice do not apply to such a right. The procedure prescribed by the Act itself in that behalf will have to be followed.

State of Uttar Pradesh v. Inder Singh 4

Objection—Under s. 12, U. P. Consolidation of Holdings Act, signed and presented by a person other than the Objector—Defect, whether curable

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| Order impugned in writ jurisdiction —Based on no evidence—Writ of <i>certiorari</i> to be used | 577 |
| Partner of a firm, entering into a contract with the Government, for the benefit of all partners—Every partner disqualified from being chosen as a member of the Legislative Assembly in view of s. 7(d) Representation of the People Act, 1951 | 673 |
| "Person" —in Art. 14, Constitution of India, 1950—If, includes "State" as representing the Society | 306 |
| Plying for hire —Rickshaws, within certain Municipal limits, meaning of | 176 |
| Procedure —To be followed, when a convict files the appeal from Jail and another through counsel within limitation | 194 |
| Provincial Small Cause Court Act, 1887, s. 25, amended by U. P. Act XVII of 1957 and U. P. General Clauses Act, 1904, s. 6(b)—Pending revisions—High Court—Jurisdiction of. | |
| By the U. P. Amendment Act, 1957, jurisdiction having been conferred on the District Judge to entertain and dispose of revisions under s. 25, Provincial Small Cause Court Act, the question was whether revision filed before the High Court prior to the Amendment Act could be heard and disposed of by it. | |
| <i>Held</i> , that all revision petitions in which record has been called for by the High Court prior to the 4th of June, 1957, could be heard and disposed of by it by virtue of s. 6 (b), U. P. General Clauses Act and on the principle of " <i>Nava Constitution futuris froman imponere debet non-practeritis</i> " : a new state of law ought to affect the future, not the past : | |
| Om Prakash v. Moti Lal | 70 |
| Provincial Small Cause Court (U. P. Amendment) Act, 1957—Amending, s. 25, Provincial Small Cause Court Act, effect of—Suitor's right, if any, under s. 6, cls. (c), (e), U. P. General Clauses Act. | |
| A S. C. C. suit, instituted in 1956 was decreed on 27th April, 1957. The Provincial Small Cause Court (U. P. Amendment) Act, 1957 (assented to by the President on 30th May, 1957, and published in the <i>Gazette</i> on the 4th June, 1957), amended s. 25, Provincial Small Cause Court Act, substituting "District Judge" in place of "High Court". On 27th July, 1957, application in revision was filed by the defendant in the High Court. | |
| Upon a preliminary objection that the revision application should have been filed in the court of the District Judge. | |
| <i>Held</i> , (i) that the alleged right to apply in revision was not the same thing as a right of appeal ; | |
| (ii) that applying in revision is not continuation of proceedings commenced in the Small Cause Court ; | |

(iii) that no right or privilege was acquired by or accrued in favour of the applicant before the Amendment Act within the meaning of s. 6, cls. (c), (e), U. P. General Clauses Act :

(iv) that the Amendment Act did not contain any provision restricting it to orders passed after it came into force ;

(v) that the right to apply may be said to have been left intact, only the forum has been changed ;

(vi) that the right to revise vested in the District Judge.

The New Singhal Dal Mill v. Firm Sheo Prasad Jainti Prasad . . .

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Re-assessment—Of income of assessee by the State, if permissible by an application to the Revising Authority under s. 22, U. P. Agricultural Income Tax Act, 1949, after the expiry of the one year rule of limitation in s. 25 of the said Act

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Relief—Under Art. 226, Constitution of India, 1950—Guiding principles, for determination of

5

Representation of the People Act, 1951, s. 7(d)—*Contract taken by firm from Government—All partners disqualified—Works “for the benefit”, meaning of—Pleading—Averment that candidate has a share or interest, sufficiency of—U. P. Sales Tax Act, 1948, s. 23(1)—Return of Sales Tax, admissibility of—Indian Evidence Act, 1872, ss. 11, 35, 74—Statement of description of witness, if admissible.*

When one partner of a firm takes a contract on behalf of the firm, he takes it for the benefit of all the partners, and all the partners of the firm are disqualified under s. 7(d) of the Representation of the People Act, 1951, for being chosen as a member of the U. P. Legislative Assembly if the contract is for the supply of goods to the appropriate Government.

The words “for his benefit” do not mean that the share or interest must be for the exclusive benefit of a candidate. If the candidate has a share or interest in the contract and is likely to be benefited along with the other partners in the firm, his case also falls within the ambit of s. 7(d) of the Act.

An averment in the pleading that a candidate has a share as well as interest in a contract for the supply of goods to the U. P. Government taken along with the allegation that the family of the candidate carries on the business as jointly under a firm name is sufficient for making out a pleading for the charge under s. 7(d) of the Representation of the People Act, 1951.

The return of sales tax, filed by an assessee under the U. P. Sales Tax Act, is a public document within the meaning of s. 74 of the Indian Evidence Act and apart from s. 35 of the Indian Evidence Act, it is also admissible under s. 11 of the Evidence Act as it makes the existence of a fact in issue highly probable

A statement as regards the description of a witness made before a Sales Tax Officer purporting to be a statement made by the witness himself is admissible in evidence even though the admission made therein was not on oath and had been made before the oath was administered.

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| Allah Bux v. Ratan Lal Jain | 673 |
| —s. 123(3)—“Symbol” meaning of—Portrait of Mahatma Gandhi—National Symbol—Corrupt practice. | |

The word “symbol” used in s. 123(3) of the Representation of People Act, 1951, can appropriately be applied to such as would represent something national by some natural fitness and it should also be an emblem.

The portrait of Mahatma Gandhi is not a national symbol within the meaning of the expression “symbol” used in s. 123 (3) of the Representation of the People Act, 1951, and its use by a candidate at election does not constitute a corrupt practice.

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| Karan Singh v. Jamuna Singh | 654 |
| Return of Sales Tax—Admissibility of, in evidence under ss. 11, 35, 75, Indian Evidence Act, 1872 | 673 |
| Reversioner—Joining in transfer by a Hindu Widow—effect of .. | 457 |
| Revision Petitions—Filed under s. 25, Provincial Small Cause Court Act, prior to its amendment by the U. P. Amendment Act of 1957—Jurisdiction of High Court to hear and dispose of .. | 70 |
| Rickshaws—Plying of—Lucknow Municipal Board Bye-laws 2 and 4, scope of—“Plying for hire”—Meaning of. | |

Held, that the Municipal Board, Lucknow, is directed to forbear from impounding rickshaws entering the Municipal limits while carrying passengers from Rup Pur Khadra (a village situate on the borders of the Lucknow Municipality, close to Islamia College Hostel, Lucknow), to destinations within those limits, or while they were taking such passengers on their return trip.

Held, further that this will not affect the right of the Board to detain in accordance with the bye-laws any vehicle which may be found plying for hire within the Municipal limits.

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| Sardar Iqbal Singh v. The Municipal Board, Lucknow .. | 176 |
| Right to apply in revision—Not the same thing as right of appeal .. | 635 |
| Right of Private Defence—If available, against an <i>ex parte</i> order by a Magistrate | 306 |
| Salary of Chairman—for the unexpired period of contract of service, where the company is wound up—if, allowable | 407 |
| Sale—of entire property, by a Hindu Widow, when justifiable, where legal necessity for sale of only a part exists | 458 |

- Sanction**—under s. 161, Indian Penal Code, but trial also under s. 5(2), Prevention of Corruption Act—Trial, if illegal ..
- Security for costs**—Deposited under s. 117 of the Representation of the People Act, 1951—Deposit when validly made ..
- Special Judge**—Appointed under the Criminal Law Amendment Act, 1952—Proceedings before, if subject to s. 350, Criminal Procedure Code ..
- Stamp Act, 1899, s. 57(1), (a), Arts. cl. 5(a), 23, 40**—*Reference—Document attested and signed purporting to sell timber—Nature of document—Conveyance or Bond—Duty payable.*
- A document describing one party as a seller and the other as a buyer purported to sell to the buyer certain timber at a price of Rs. 50,000 which was to be paid in certain instalments and the instalments were made a charge on the produce, the document was signed by both the parties and was duly attested.
- Held*, such a document fulfils all the conditions of a bond as defined in sub-cl. (b) of cl. (5) of s. 2 and hence is not chargeable as conveyance under Art. 23 of the Schedule of the Stamp Act, nor is it exempt from stamp duty altogether under the exemption (a) to Art. 5 of the Schedule. The proper duty payable in respect of it is duty on a bond under Art. 15, read with Art. 40 of the Schedule.
- Board of Revenue, Uttar Pradesh v. Padum Bahadur Singh** ..
- Surrender**—By Hindu Widow—Essential ingredients of ..
- "Symbol"**—In s. 123 (3), Representation of the People Act, 1951, meaning of ..
- Symbol or emblem**—How and when it becomes a "national symbol" or "national emblem". ..
- Transfer**—by a Hindu Widow—Recitals in the deed of transfer—if and when sufficient proof of legal necessity ..
- Transfer**—of property by a Mahant—alleging it to be (i) his personal property, or (ii) Math property—Adverse possession, when begins in either case ..
- U. P. Agricultural Income Tax Act, 1949, ss. 22, 25**—*Limitation to reassess expired—State if to get re-assessment under revisional powers—Constitution of India, 1950, Art. 226.*
- It is not open to the State to circumvent all the provisions of s. 25 of the Agricultural Income Tax Act by making a belated application under s. 22 of the Act to the revising authority and attempting in that way to have the income of assessee reassessed after the period of limitation of one year fixed for that purpose, has expired.
- Messrs. L. R. Brothers, v. The Agricultural Income Tax Board, U. P., Lucknow** ..

Uttar Pradesh Consolidation of Holdings Act, 1953, s. 12, and Civil Procedure Code, 1908, Or. III, r.4—Application signed and presented by a person other than the objector—Defect whether curable.

Dispute having arisen in connexion with consolidation proceedings, an objection was filed under s. 12, U. P. Consolidation of Holdings Act, on behalf of two persons. It having been signed and presented by a person other than the objectors, the contention was that the objection under s. 12 was void.

Held, that, the absence of the signature of the objectors on the application as also its defective presentation did not render the application void. It constituted a mere irregularity which was curable. The Deputy Director of Consolidation rightly directed the defects to be removed.

Shiv Narain v. The Deputy Director, Consolidation, Mathura ..

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United Provinces Municipalities Act, 1916, s. 128 (1), cl. (xiv)—Hardwar Municipality—Notification imposing toll on vehicles leaving Municipality not ultra vires—Vehicle paying toll while entering—No toll to be levied when going out.

Notification, dated the 29th October, 1941, issued by the Hardwar Municipal Board in exercise of the powers conferred on it by s. 128 (1), cl. (xiv) of the United Provinces Municipalities Act, 1916, imposing a toll on vehicles going out of the limits of the Municipal Board is not *ultra vires* its powers in so far as it purports to invest the Board with that authority.

But a toll shall not be levied again on a vehicle which has paid a toll when last entering the limits of the Municipal Board, on its leaving the limits of the Hardwar Union Municipality.

Municipal Board, Hardwar v. Raghubir Singh ..

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—ss. 178, 180(5), 298—U. P. Town Improvement Act, 1919, s. 49—Bye-laws framed under s.298 Municipalities Act, read with s. 49(1), Town Improvement Act, if applicable to an area within the municipality and covered by an Improvement scheme—Powers of Municipal Board transferred to Trust under s.49, Town Improvement Act, effect of—Notice of construction under ss. 178, 180(5) United Provinces Municipalities Act, read with s. 49 (1), Town Improvement Act, if and when due to the Trust.

G. P. took on lease a plot of land in the Mumfordganj Housing Scheme from the Allahabad Improvement Trust and made certain constructions thereupon without notice to and sanction from the Trust.

Complaint by the Trust under s. 185, United Provinces Municipalities Act, read with s. 49, U. P. Town Improvement Act, was dismissed by the Sub-Divisional Magistrate holding that the bye-law no. 30, sub-head (h) (vi) of the Allahabad Municipality, framed under s. 298 of the United Provinces Municipalities Act, did not apply to the above housing scheme.

On appeal by the State and a revision application by the Trust :

Held, (i) that the bye-laws framed under s. 298, United Provinces Municipalities Act, as a sort of addenda to several sections of the said Act as specified in s. 49(1) United Provinces Town Improvement Act, were by virtue of the said provision of the latter Act, applicable to an area within the municipality and covered by an Improvement scheme ;

(ii) that powers of the Municipal Board are transferred under s. 49, U. P. Town Improvement Act, to the Trust, which can hence enforce the bye-laws of the Municipality ;

(iii) that ss. 178, 180(5), United Provinces Municipalities Act, read with s. 49 (1) U. P. Town Improvement Act, enjoin that a person shall give notice to the Trust of his intention to erect a new building where the building abuts on or is adjacent to a public street, place or property vested in the Government or the Trust unless by an appropriate bye-law the necessity of giving notice is extended to all buildings in the area ;

(iv) that S. D. M. did not in the instant case record a finding that notice was not necessary ;

(v) that the case be sent back to the Magistrate for re-trial.

State v. Gir Prasad Gupta

United Provinces Sugar Factories Control Act, 1938, s. 18(2), rule 23(1)—*Agreement to be in writing within the meaning of the expression used in the rule—Jurisdiction of Cane Commissioner.*

The agreement referred to in s. 18(2) must be in writing. If the agreement is not in writing, it cannot be said to be an agreement referred to in s. 18(2) within the meaning of the expression as used in rule 23(1). If the agreement is not in writing, the Cane Commissioner will have no jurisdiction to decide a dispute between the sugar factory and the cane-growers.

The Co-operative Marketing and Development Union Ltd., Bara Banki v. Kamlapat Moti Lal Sugar Mills, Masodha

Uttar Pradesh Zamindar's Debt Redemption Act, 1953, s. 2(f) :—*Debt—Question raised as to exclusion of certain debts invalid—Constitution of India, 1950, Arts. 14, 228—Civil Procedure Code, 1908, s. 113, proviso—Application to state case to High Court as to validity—Entertainable—Even if protection not available.*

In a suit for recovery of money due under an instrument of mortgage by a Scheduled Bank against a zamindar, the defendant claimed relief under the Uttar Pradesh Zamindar's Debt Redemption Act, 1953, and contended that the definition of "debt" in the Act so far as it excluded certain debts offended Art. 14 of the Constitution of India and made an application under the proviso to s. 113 of the Civil Procedure Code asking the court to state a case for the opinion of the High Court as to the invalidity of the impugned portion of the definition in the Act. The court rejected the application on the

ground that even if the impugned portion was invalid the defendant would lose the protection of the Act as the impugned portion was not severable from the rest of the definition of debt which will become invalid. The defendant took the matter to the High Court both by an application in revision and an application under Art. 228 of the Constitution. The High Court rejected both the applications. On an appeal to the Supreme Court—

Held, that the question raised came within the proviso to s. 113 of the Civil Procedure Code, 1908, as also under Art. 228 of the Constitution of India as it was necessary to decide the question of the validity of the impugned portion of the definition to dispose of the case.

Held, further that a question as to the interpretation of the Constitution also arose as the validity of the provision was challenged on the ground that it contravenes an Article of the Constitution.

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THE INDIAN LAW REPORTS

ALLAHABAD SERIES

(FULL BENCH) CIVIL REFERENCE

*Before the Honourable O. H. Mootham, Chief Justice,
Mr. Justice Mukerji and Mr. Justice Srivastava*

BOARD OF REVENUE, UTTAR PRADESH
(APPLICANT)

v.

PADUM BAHADUR SINGH (OPPOSITE PARTY)

1957
March, 25

Stamp Act, 1879, s. (1) (a), Art. 5(a), 15, 23, 40—Reference
—Document attested and signed purporting to sell timber—
Nature of document—Conveyance or Bond—Duty payable.

A document describing one party as a seller and the other as a buyer purported to sell to the buyer certain timber at a price of Rs.50,000 which was to be paid in certain instalments and the instalments were made a charge on the produce, the document was signed by both the parties and was duly attested.

Held, such a document fulfils all the conditions of a bond as defined in sub-cl. (b) of cl. (5) of s. 2 and hence is not chargeable as a conveyance under Art. 23 of the Schedule of the Stamp Act, nor is it exempt from stamp duty altogether under the exemption (a) to Art. 5 of the Schedule. The proper duty payable in respect of it is a duty on a bond under Art. 15, read with Art. 40, of the Schedule.

L. H. Sugar Factory, Pilibhit v. Moti (1) referred to.
Miscellaneous Reference No. 342 of 1952.

The facts appear in the judgment.

S. S. Srivastava for the applicant.

The Standing Counsel for the opposite party.

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The judgment of the Court was delivered by—

SRIVASTAVA, J. :—This is a reference by the Board of Revenue under section 57 (1) (a) of the Indian Stamp Act.

On the 1st of December, 1950, Kunwar Padum Bahadur Singh executed a document in favour of Ramesh Chandra. In this document Kunwar Padum Bahadur Singh was described as the seller, while Ramesh Chandra was described as the buyer. Clause I of this document is in these words :

“The seller in consideration of the payment by the buyer as hereinafter provided of the price of Rs.50,000 (rupees fifty thousand) sells to the buyer, subject to the conditions hereinafter appearing, all the trees excepting *sal*, *sain*, *shisham* and *khair* up to 15 inches girth measured at a height of 6 inches from the surface in Compartment nos. 1, 2, 3, 4, 5, 8, 9 and 11 including the part commonly known as Majhara in part of village Rynorpur Grant; pargana Eastern Doon, district Dehra Dun, approximate area 886 acres.”

Then comes clause 2, which provides as follows :

The Buyer shall pay the said sum of Rs.50,000 (Rupees fifty thousand) to the seller by the following instalments, namely :

- (1) Rs.5,000 (rupees five thousand) on or before 3rd January, 1951.
- (2) Rs.15,000 (rupees fifteen thousand) on or before 15th April, 1951.
- (3) Rs.10,000 (rupees ten thousand) on or before 15th September, 1951.
- (4) Rs.10,000 (rupees ten thousand) on or before 3rd January, 1952.
- (5) Rs.10,000 (rupees ten thousand) on or before 15th March, 1952.

The other clauses lay down the conditions under which the trees sold were to be cut and removed. The

seller was authorized in case the forest produce exported by the buyer equalled or exceeded the price paid by him to stop further export until the buyer had paid an additional amount and it was also provided that the amount of instalments provided by clause 2, was to remain a charge on the produce sold.

The document was stamped with a stamp of Re.1 only and was attested by two witnesses Shiam Singh and Brijesh, besides being signed by the two parties to the transaction.

The document came to the notice of the Collector who was of the opinion that it was deficiently stamped. He thought that it was a deed of conveyance as defined in section 2 (10) of the Stamp Act and was as such chargeable with duty under Article 23 of the Schedule of the Act. He, therefore, made a reference to the Board of Revenue, which is the Chief Controlling Revenue Authority within the meaning of the Stamp Act, for its opinion. The Board of Revenue felt doubtful as to whether the document was liable to duty as a conveyance under Article 23 or whether it was exempt from duty altogether under exemption (a) of Article 5 of the Schedule. It has, therefore, referred the question to this Court for decision under section 59 of the Act.

Though the Board has referred only to Articles 23 and 5 of the Schedule, keeping in view clauses (2) and (6) of the document, it has also to be considered whether the document was to be stamped as a bond under Article 15 or as a mortgage under Article 40 of the Schedule.

Now section 2 (10) of the Act defines a conveyance as follows :

“ ‘Conveyance’ includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule I.”

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Article 5 is in these words :

“Agreement or Memorandum of an Agreement—

(a) if relating to Annas two.

the sale of
a bill of
exchange ;

(b) if relating Subject to a maximum
to the sale of ten rupees, one anna
of a Govern- for every Rs.10,000 or
ment secu- part thereof of the value
rity or share of the security or share.

in an incor-
p o r a t e d
company or
other body
corporate ;

(c) if not other- Annas eight.

wise pro-
vided for ;

Exemptions

Agreement or memorandum of agreement—

(a) for or relating to the sale of goods or mer-
chandise exclusively, not being a NOTE
OR MEMORANDUM chargeable under
no. 43 ;

(b) made in the form of tenders to the Central
Government for or relating to any loan.

A bond is defined in clause (5) of section 2. The clause has three sub-clauses. Sub-clauses (a) and (c) are not relevant for our purposes. According to clause (5), sub-clause (b), a bond “includes any instrument attested by a witness and not payable to order to bearer whereby a person obliges himself to pay money to another”.

A “mortgage deed” is defined in clause (17) of section 2 as including ‘every instrument whereby for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt or the

performance of an engagement, one person transfers, or creates, to, or in favour of another, a right over or in respect of a specified property”.

The Collector took the view in respect of the document in question that it was a conveyance as by it the property in standing timber was transferred *inter vivos*.

The learned counsel who appeared for the opposite party urged against the view of the Collector that the document in question did not evidence a transaction of sale at all and was, therefore, not liable to be stamped as a conveyance. It only incorporated certain terms agreed between the parties and was, therefore, covered by clause (c) of Article 5 of Schedule I of the Stamp Act. It has, therefore, been properly stamped as an agreement. He went one step further and contended that even if the document was considered to be one by which the standing timber was transferred, it could not be required to be stamped as a conveyance or even as an agreement. It was really exempt from stamp duty altogether because it fell under exemption (a) of Article 5 of the Schedule.

Another view which appears to be possible is that as by this document Ramesh Chandra obliged himself to pay Rs.50,000 to Kunwar Padum Bahadur Singh and the document was attested by witnesses and was not payable to order or bearer, it amounted to a bond. By this very document a charge had been created in respect of the amount which Ramesh Chandra had agreed to pay over the properties which had been sold to him. On that account the document could also be considered to be a mortgage deed.

It is difficult to accept the contention that the document before us does not evidence a transaction of sale at all. We have already quoted the first clause of the document which clearly shows that it was by this document that the transaction of sale was being effected. The two parties described themselves as buyer and seller, and the sum of Rs.50,000 was described as the price.

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Clause 6 of the document is in these words :

“ The ownership of the produce hereby sold shall vest in the Buyer, but any amount of the instalments provided for under Article 2 of this Indenture, remaining due against the Buyer, shall remain a charge on the said produce.”

This shows that the document was intended to transfer ownership of the property which was being sold and the property in the timber sold vested immediately in the buyer as a result of the sale.

Clause 7 of the document reiterates the same position. It is in these words :

“ The forest produce sold to the Buyer under this Indenture will remain at the Buyer's risk from the date hereof, and the seller will not be responsible for any loss or damage which may occur thereto from any cause whatsoever.”

Thus the terms of the document make it perfectly plain that it is a document by which the property was sold by one person to another.

That alone will, however, not necessarily make the document a “conveyance”. In spite of being a document by which a sale was being effected, it will fall outside the definition of conveyance if it is one which is otherwise specifically provided for in Schedule I. This follows from the last few words of the definition of the conveyance itself. It is urged that such a specific provision is to be found in Article 5 of the Schedule.

The Article which provides for agreements or memorandum of agreements has three clauses. Clauses (a) and (b) of the Article mention two particular kinds of agreements, but clause (c) is a residuary clause which covers agreements or memoranda of agreement which do not fall under clauses (a) and (b) and are, therefore, not otherwise provided for. If the document in question is an agreement or memorandum of agreement it will fall under clause (c). The word agreement in this

connexion must be taken in the sense in which it has been defined in section 2 of the Contract Act. There, an agreement is equivalent to promise and a promise tantamounts to a proposal or offer which has been accepted. An agreement must, therefore, be held to be a proposal accepted by the person to whom it is made. The document in dispute which is a bilateral document was obviously intended to be a record of the mutual promises which the parties had made to each other as a result of negotiations or proposals made and accepted. It cannot, therefore, be seriously questioned that the document so far as it is a record of terms agreed upon is an agreement. As it does not fall within clauses (a) and (b) of Article 5, it must naturally fall within clause (c) of it.

Article 5 is, however, not the only Article of Schedule I, Stamp Act, under which the document can fall. By this instrument, Ramesh Chandra agreed to be liable to pay and obliged himself to pay Rs.50,000 to Padum Bahadur Singh. The instrument was not made payable to order of bearer. It was duly signed by Ramesh Chandra and has been attested by two witnesses. It, therefore, falls within the definition of the word "bond" as given in sub-clause (b) of clause (5) of section 2 of the Act, and has been provided for in Article 15 of the First Schedule of the Act.

By clause 6 of the document a charge was created in respect of the amount of unpaid instalments over the forest produce which was being sold by the vendor to Ramesh Chandra. The price was not being paid in cash. Ramesh Chandra was undertaking to pay it in future. It, therefore, became a debt for which he was undertaking liability. The parties considered it necessary that the debt should be secured. A charge was, therefore, created in respect of it in favour of the vendee. The charge was created over the property which was being sold and which was specified in the deed. From this point of view the document in question must be held to be a "mortgage deed" as defined in clause (17) of section 2 of the Act.

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As a bond, the document will fall under item no. 15 of the Schedule and as a mortgage deed it will fall under item no. 40 of the Schedule.

There are thus at least three items in the First Schedule under which the document can fall. It obviously cannot be held to be a document "not otherwise specifically provided for by Schedule I" and must on that account be held excluded from the purview of the definition of "conveyance" as given in section 2(10) of the Act. The Collector was, therefore, not justified in his view that the document was chargeable to duty as a conveyance under Article 23 of the Schedule.

Though the document in question falls under clause (c) of Article 5, because it is an agreement it does not appear to be necessary to go into the further question whether it falls under exemption (a) of Article 5, because it relates to the sale of goods or merchandise. As it falls under the definition of a bond also, it cannot be exempt from duty altogether and has to be stamped as a bond. In the case of *L. H. Sugar Factory, Pilibhit v. Moti* (1), it was pointed out by IQBAL AHMAD, acting C. J., that if an agreement for the sale of goods or merchandise contained an undertaking and happened to be attested it would become a bond and would not remain a mere agreement for the sale of goods or merchandise. The document in that case had three aspects. By it the executants sold some sugarcane to a mill. They also agreed to pay back the amount they were taking or were to receive in a specified manner. They at the same time hypothecated the sugarcane crop for the advance which they had obtained. The agreement was duly attested. It was, therefore, held that it was not altogether exempt from stamp duty as an agreement for the sale of goods or merchandise, but was liable to be stamped as a bond. IQBAL AHMAD, acting C. J., observed in this connexion :

"Agreements for the sale of goods or merchandise contemplated by Article 5, Schedule I, do

not require attestation and, therefore, such agreements, if unattested, would remain mere agreements even though there is a covenant as to the delivery of the goods agreed to be sold.

But the moment such an agreement is attested, it becomes a bond. This view is in accord with the Full Bench decision of the Madras High Court in Reference under section 46, Stamp Act (1). It was held in that case that a promissory note not payable to bearer or order, if attested, becomes a bond. To the same effect is the Full Bench decision of the Bombay High Court in *re Ralli Bros.* (2). It was laid down in that case that an agreement for sale of cotton between two merchants, when attested by a witness, becomes a bond with in the meaning of the Stamp Act, 1889."

The view that on account of being attested the document which contained an undertaking to pay money became a bond was shared by the other learned Judges also who were constituting the Full Bench.

The document before us also fulfils all the conditions of a bond as defined in sub-clause (b) of clause (5) of section 2 and is duly attested. On that account it cannot be held to be a mere agreement for or relating to sale of goods, and becomes chargeable under Article 15 of Schedule I. It cannot, therefore, be held to be entirely exempt from liability for stamp duty.

The document certainly creates a charge in respect of the amount payable on specified property and it can, therefore, be said that it is liable to be stamped as a mortgage deed too. But these two aspects of the document do not appear to be such as can make it a document comprising or relating to two distinct matters as contemplated by section 5 of the Stamp Act so as to

(1) (1885) I. L. R. 8 Mad. 87.

(2) () 8 Bom. L. R. 234,

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make it chargeable with the aggregate amount of duties payable on a "bond" and a "mortgage deed". The charge that has been created was meant to secure the very amount which the vendor was undertaking to pay—the undertaking on account of which the document is being held to be a bond. The document could, therefore, be stamped either as a bond or as mortgage deed and not as both.

Section 6 of the Stamp Act, which provides that instruments so framed as to come within two or more of the descriptions in Schedule I, shall, where the duty is chargeable thereunder are different, be chargeable only with the highest of such duties, cannot affect the document in question as the duty payable on it as a mortgage deed appears to be the same as that payable on it as a bond. In the present case, therefore, there is no difference between the duties chargeable in respect of document whether it falls under one description or the other.

The proper duty which should, therefore, have been paid in respect of it was not the duty of one rupee which has been paid, but a duty of Rs.205.

Our answer to the reference, therefore, is that the document in question is not chargeable as a conveyance under Article 23 of the Schedule of the Stamp Act, nor is it exempt from stamp duty altogether under the exemption (a) to Article 5 of the Schedule. The proper duty payable in respect of it is a duty on a bond under Article 15 read with Article 40 of the Schedule. We answer the reference accordingly.

Reference Answered.

CRIMINAL REVISION

*Before Mr. Justice Bhargava and Mr. Justice Mulla**

M. R. MALHOTRA AND ANOTHER

v.

STATE

Criminal Trial—Special Judge, Anti-Corruption—Termination of Service—Case pending—Evidence, production of—Special Judge's successor, appointment of—Re-trial of the case—Criminal Procedure Code, 1898, s. 350, scope of—Criminal Law Amendment Act, 1952, ss. 8 and 9, applicability of.

Held, that s. 350, Criminal Procedure Code, is not applicable to the proceedings before the Special Judge appointed under the Criminal Law Amendment Act no. XLVI of 1952.

State of Delhi v. Sy. Krishnaswamy (1), *Gopal Prasad v. The State* (2) *relied on. A Vaidyanatha Iyer, in re* (3), *The Queen v. Norfolk County Council* (4) *dissented from.*

Criminal Revision no. 205 of 1957 from an order of Shah Ghayas Alam, Special Judge of Anti-Corruption, Lucknow, dated 19th August, 1957.

The facts appear in the judgment.

B. L. Kaul holding brief of *S. L. Suri* for the applicants.

The Additional Government Advocate for the State.

BHARGAVA, J.:—I have had the benefit of reading the judgment proposed to be delivered by my brother MULLA, J. I agree with him that section 350 of the Code of Criminal Procedure is not applicable in the case of a Special Judge appointed under the Criminal Law Amendment Act no. XLVI of 1952, but I would like to give the reasons for my opinion in my own language. My brother, MULLA, J., has already discussed the three relevant decisions of the Madras, the Patna and the

*Sitting at Lucknow.

(2) A.I.R. 1954 Pat. 543.

(1) A.I.R. 1954 Pun. 294.

(3) A.I.R. 1954 Mad. 350.

(4) L.J. [1891] 60 Q.B. 379.

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Punjab High Courts and it does not appear to be necessary for me to comment on those cases again.

It appears to me that, in designating the court, which is empowered to try cases under the Criminal Law Amendment Act, 1952, as a court of a Special Judge, the Legislature clearly intended to indicate that a Special Judge will neither be a Magistrate nor a court of session as constituted under the Code of Criminal Procedure. Had there been any intention that the Special Judge was to be a magistrate or a court of session, it was easy for the Legislature to lay down in the Criminal Law Amendment Act, 1952, itself that the power of trying cases under that law would be exercised by a magistrate or a court of session. Consequently, in considering the applicability of the provisions of the Code of Criminal Procedure to a Special Judge, it has to be kept in view that he is neither a magistrate nor a court of session. His is a special class of court constituted under that special law and, consequently, the Code of Criminal Procedure is to be applied in his case only to the extent that the Criminal Law Amendment Act, 1952, itself makes it applicable. The relevant provision, as has been pointed out by my brother, MULLA, J., is contained in section 8 of that Act. Under sub-section (1) of section 8 the Special Judge, who is neither a magistrate nor a court of session, is empowered to take cognizance of offences without the cases being committed to him for trial and then there is the further direction that, in trying the accused persons, he is to follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by magistrates. The language of this sub-section does not indicate that the Special Judge has been equated with a magistrate or has been constituted a magistrate for the purpose of trying cases under that Act. All that sub-section (1) of section 8 does is to empower the Special Judge to take cognizance of cases without proceedings of commitment and then it lays down the procedure which is to be followed by him in the trial of a case of which he has taken cognizance. The fact that he is to follow

the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by Magistrates cannot convert a Special Judge into a magistrate. Then comes sub-section (3) of section 8 under which, subject to the over-riding provision of sub-section (1), the remaining provisions of the Code of Criminal Procedure have also been applied to proceedings before him to the extent that those provisions are not inconsistent with the provisions of the Criminal Law Amendment Act, 1952. Sub-section (3) then further proceeds to lay down a fiction of law, that, for purposes of those provisions of the Code of Criminal Procedure which become applicable under sub-section (3) of section 8, the court of a Special Judge is to be deemed to be a court of session trying cases without a jury or without the aid of assessors. Thus sub-section (3) of section 8 also recognizes the fact that a Special Judge is neither a magistrate nor a court of session but, by a legal fiction, which is frequently resorted to by the Legislature, the Special Judge is to be deemed to be a court of session for the limited purposes of those provisions of the Code of Criminal Procedure which become applicable to proceedings before him under sub-section (3) of section 8, but excluding those provisions of the Code of Criminal Procedure which become applicable to proceedings under sub-section (1) of that section. The effect, it appears to me, of the provision made in this manner in the Criminal Law Amendment Act, 1952, is that, even though a Special Judge is neither a magistrate nor a court of session, he has to follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by a magistrate and except for those provisions which relate to the procedure for the trial of warrant cases by magistrates, he is to be considered in law to be a court of session for all other provisions of the Code of Criminal Procedure which become applicable to him under sub-section (3) of section 8. Section 350 of the Code of Criminal Procedure only governs proceedings before a magistrate and not before a court of session. Consequently section 350 of the Code of Criminal Procedure cannot be applied to proceedings before him

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the trial of warrant cases by magistrates cannot be accepted. This argument can be supported by learned counsel only on the basis of the language of section 251 of the Code of Criminal Procedure which existed at the time when the Criminal Law Amendment Act, 1952, was passed. At that time the Code of Criminal Procedure had not been amended by the Code of Criminal Procedure (Amendment) Act no. XXVI of 1955 and section 251 of the Code reads as follows :

“251. The following procedure shall be observed by magistrates in the trial of warrant cases”.

The use of the word “following” in that section at that time was sought to be construed as indicating that all procedural sections, which apply to the trial of a warrant case by a magistrate, must be treated as a part of the procedure for the trial of warrant cases by magistrates under the Code of Criminal Procedure, but a further examination of the other provisions of the Code leads to the inference that this interpretation cannot be correct. Chapter XXI, which contains sections 251 to 259, deals exclusively with the procedure for the trial of warrant cases by magistrates. That Chapter is followed by Chapter XXII which lays down the procedure for summary trials and contains sections 260 to 265. Then comes Chapter XXIII containing sections 266 to 335 which lays down the procedure regulating trials before High Courts and courts of session. Though these two Chapters follow section 251, clearly, the provisions in these Chapters cannot be applied to the trial of warrant cases by magistrates and cannot be said to have been referred to by the use of the word “following” in section 251. Section 350 is placed in Chapter XXIV which comes subsequent to Chapters XXII and XXIII. The provisions of this section contained in a later Chapter cannot be held to be referred to by the use of the word “following” in section 251. Consequently, it must be held that, by using the expression “the procedure, prescribed by the Code of Criminal Procedure, for the trial of warrant cases by magistrates”, the law laid down in

sub-section (1) of section 8 of the Criminal Law Amendment Act, 1952, only made the provisions of sections 252 to 259 of the Code of Criminal Procedure applicable to the trial of a case by a Special Judge and did not make all other subsequent provisions so applicable. Section 350 not having been made applicable by sub-section (1) of section 8 of the Criminal Law Amendment Act, 1952, it cannot be held to apply on any other consideration; because, as I have said above, a Special Judge is not a magistrate and section 350 of the Code of Criminal Procedure applies only to proceedings before magistrates and not to proceedings before all kinds of courts.

Another additional reason, which appears to me to justify the view that section 350 of the Code of Criminal Procedure does not apply to proceedings before a Special Judge, is indicated by the language of section 350 of the Code of Criminal Procedure itself which is to the following effect :

“350. (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself :

Provided that if the succeeding Magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) Nothing in this section applies to cases in which proceedings have been stayed under section 346 or in which proceedings have

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been submitted to a superior Magistrate under section 349.

- (3) When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub-section (1)."

The language of the section indicates that what this section purports to lay down is not a part of the procedure to be adopted by a magistrate in the trial of a case but is much more in the nature of a rule of evidence. It empowers a magistrate, who succeeds another magistrate after the case has been partly heard and the whole or part of the evidence has been recorded, to act on the evidence already recorded by his predecessor or to act on the evidence partly recorded by his predecessor and partly recorded by himself. The power of the Magistrate to act on evidence can hardly be said to be a matter of procedure for the trial of a case. It is really a power to be exercised by a magistrate to admit evidence which has been wholly or partly recorded by his predecessor which is a modification of the normal rule of evidence that a court must act entirely on the evidence recorded by itself. The mere fact that this provision has been made in the Code of Criminal Procedure does not necessarily mean that it must be a part of the procedure for the trial of a case. It actually embodies a special rule relating to admissibility of evidence just as section 162 of the Code of Criminal Procedure lays down a special rule of evidence applicable to cases governed by the Code of Criminal Procedure. For this reason also, it has to be held that section 350 of the Code of Criminal Procedure is not a part of the procedure for the trial of warrant cases by Magistrates, so that it is not made applicable to the proceedings before the Special Judge under sub-section (1) of section 8 of the Criminal Law Amendment Act, 1952.

The argument based on the provision made in section 9 of the Criminal Law Amendment Act, 1952, has already been dealt with by my brother MULLA, J.,

and I do not consider it necessary to deal with this point in any greater detail.

Consequently, the two applications must in my opinion, be dismissed and the stay orders vacated.

MULLA, J. :—These are two criminal revisions which have been connected together because the decision in both the cases depends upon the determination of the same point of law. The applicants in both these cases are public servants who are being prosecuted under section 5 (2) of the Prevention of Corruption Act (Act II of 1947) apart from other offences, and these cases are pending in the court of the Special Judge, Anti-Corruption, U. P., Lucknow. Sri B. N. Zutshi was the Special Judge who was hearing these cases, but his services were terminated before he could pronounce judgments. In one case the prosecution evidence was completed and in the other case only arguments were to be heard. They came up for hearing before Sri Shah Ghyas Alam, the successor of Sri B. N. Zutshi, on 19th August, 1957. The applicants prayed that the proceedings should be continued from the stage reached, as otherwise they would be subjected to extreme hardship, for there is a mass of evidence in both these cases, but the Special Judge although fully appreciating the equitableness of the prayer felt that the law did not permit him to adopt this course, and so he ordered that a fresh trial would be held in these cases. It is against this order that the applicants have come up in revision.

There can be no doubt that a fresh trial in these cases would not only inflict unjustifiable hardship and loss upon the applicants, but will also mean substantial expense for the State. It would also delay the disposal of these cases and quite a considerable time of the Special Judge would be wasted by covering the same ground again. The relief sought, therefore, suits not only the applicants but the prosecution also. It was perhaps for this reason that the Additional Government Advocate did not oppose these applications, but took up the stand that if this relief is permissible under the law, he would not oppose it.

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But the duty of a Court of Law is clear. It cannot give any relief, however equitable it might be, if it is in conflict with the express direction contained in the statute. So long as the words of the statute are vague or ambiguous and are capable of being construed in a manner which is consistent with the equity of the case, they can be so interpreted, but where the direction contained in the statute is clear and unambiguous, it is not open to a court to disregard that direction. In such a case it is for the Legislature to amend the statute if it wants to afford the desired relief. The duty of the court is merely to interpret the law as it stands irrespective of the consequences and pass its orders accordingly.

Therefore, the only point to be decided in these cases is, whether or not it was possible for the Special Judge to grant the relief sought by the applicants under the existing law. This in its turn depends upon our answer to the question whether the provisions of section 350 of the Code of Criminal Procedure apply to the proceedings before a Special Judge, Anti-Corruption, or not. If the Special Judge can be classed as a magistrate, these provisions would apply, but if he is to be regarded as a Sessions Judge, they have no application and the Special Judge had no power to grant the relief claimed.

It is true that in one of these cases a prayer to grant this relief under section 561-A, Criminal Procedure Code, is also made, but in my opinion it would not be a correct exercise of our inherent powers if we sanction a procedure which is not permissible under the Criminal Procedure Code. These powers can only be exercised within the frame-work of the law and not in violation of the law.

Coming back to the point at issue, to the best of my knowledge there are only three decisions of three different High Courts which have dealt with it. These decisions are not unanimous and there is conflict between them. All the three decisions are Division Bench decisions. The first in point of time is the Madras decision in *In re A. Vaidyanatha Iyer* (1). This decision supports the

(1) A.I.R. 1954 Mad. 350.

contention of the counsel for the applicants that such a relief can be given. The learned Judges observed :

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"In our opinion the mere enactment of s. 9 (Criminal Law Amendment Act, 1952) would show that the Legislature did not intend the Special Judge to be a Sessions Judge at all. . . We are definitely of opinion that when sub-s. (3) of s. 8 of the Act says that 'the court of the Special Judge *shall be deemed* to be a court of session, it certainly is not in fact a court of session. The court is that of a Special Judge whose procedure in the trial of such cases shall be the procedure prescribed by the Criminal Procedure Code for the trial of warrant cases, in which case s. 350 of the Code is definitely applicable."

This decision was considered by a Division Bench of the Patna High Court in *Gopal Prasad v. The State* (1) and the learned Judges doubted the correctness of the view expressed above. The contrary view was expressed by DAS, J., who observed :

"It seems to me that sub-s. (3) of s. 8, Criminal Law Amendment Act, 1952, is quite clear. It states that for the purposes of the provisions of the Code of Criminal Procedure the Court of the Special Judge shall be deemed to be a court of session trying cases without a jury or without the aid of assessors. If the court of the Special Judge shall be deemed to be a court of session for the purposes of the provisions of the Code of Criminal Procedure, I do not see how s. 350 can apply. Section 350 in express terms applies only to the court of a magistrate and not to the court of session. Even if the expression 'shall be deemed to be' creates what is called a statutory fiction, the fiction has to be accepted because the law itself creates a fiction."

(1). A.I.R. 1954 Pat. 543.

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The third decision is of the Punjab High Court in *State of Delhi v. S. Y. Krishnaswamy* (1). In this case the learned Judges did not refer to the Madras and Patna decisions cited above, but their view was the same as that of the Patna High Court and they held that a Special Judge stood on the same footing as a Sessions Judge and he could exercise the same powers under section 503, Criminal Procedure Code, as any court of session. It seems to me that the intention of the Legislature to confer the status of a Sessions Judge upon the Special Judges created under the Criminal Law Amendment Act, 1952, is expressed in as clear terms as possible and it is not open to a court to disregard it. I, therefore, agree with the view expressed by the Patna and Punjab High Courts and the Madras view is not acceptable to me. I now proceed to give reasons for the opinion which I have expressed.

But before dealing with the relevant provisions of law I will first give the background of the Criminal Law Amendment Act, 1952, (Act XLVI of 1952), by which these Special Judges were created. This in my opinion will be of great help in understanding the intention of the Legislature.

The Prevention of Corruption Act was brought on the statute in 1947. This law was enacted to make a more effectual provision for the prevention of bribery and corruption which was rapidly spreading in the public services. This by itself indicates that the existing law was found inadequate to deal with the growing evil which had become rampant and so it had to be supplemented by a new measure which could deal with it more effectively. The Legislature, therefore, had a dual intention in enacting this law. Firstly, it wanted such offences to be tried by such courts which could inflict adequate punishment for these crimes and, secondly, it wanted a speedy procedure to dispose of these cases, for their number was alarmingly large. Several courts were, therefore, created to deal with the situation and as enhanced and deterrent punishment was to be awarded to the offenders, it became necessary to have experienced Judicial Officers as the Presiding Officers of these courts.

(1) A.I.R. 1954 Punj. 294.

Then came the question as to what would be the most suitable mode of trial for these cases. The procedure of a Sessions trial was obviously not suitable for these cases, for a court of session is not a court of original jurisdiction, and if this procedure had been accepted, it would have considerably delayed the disposal of these cases, for commitment proceedings would have been necessary and it would have defeated one of the main objects of this enactment, namely, speedy disposal. As laid down in section 193 of the Criminal Procedure Code :

“(1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the accused has been committed to it by a magistrate duly empowered in that behalf.”

Apart from this a sessions trial starts after a charge has been framed against an accused person with the recording of his plea and in the trial for an offence for which an accused was likely to be sentenced to a long term of imprisonment it was highly undesirable that he should be called upon to plead guilty or not guilty when no evidence has been recorded and no charge has been framed. The accused would have been highly prejudiced if he was called upon to plead to a charge which was not supported by any recorded evidence. Therefore, the only procedure amongst the existing procedures which was suitable for the trial of these cases was the procedure prescribed for “Warrant Cases”. The Legislature, therefore, selected this procedure for these trials. The Presiding Officers of these courts were first designated as Special Magistrates although they were wholly appointed either from the retired or the functioning Sessions Judges. The forum of appeal was determined by the applicable sections of the Criminal Procedure Code. This system of trial for these cases continued for a few years and then in 1952 Criminal Law Amendment Act, (Act XLVI of 1952), was enacted by which these Special Magistrates were converted into Special Judges.

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This change in designation was by itself highly significant for there appears to be no understandable reason why they were to be called "Special Judges" if they were to continue to function as "Special Magistrates".

It is not difficult to understand why this change was necessary. It is one of the basic principles of justice that an appellate court should be more experienced than the trial court, for it has to correct the errors committed by the trial court. Appeals from the decisions of these Special Magistrates were normally heard by the functioning Sessions Judges, who at best were only equally experienced and frequently less experienced than these Special Magistrates, for I have already mentioned above that most of these officers were retired Sessions Judges. An anomalous position was thus created, for in almost every case the trial court was more experienced than the appellate court and yet the decision of a less experienced court was to prevail over the decision of a more experienced court. This violated a fundamental principle of justice and, therefore, the Legislature had only two options before it. It could either appoint less experienced officers as the Presiding Officers of these special courts and give them the power to inflict such heavy sentences, or if it was to retain the services of these experienced officers, it had to confer upon them the status of a Sessions Judge so that an appeal from their decision should lie before the High Court and not before the Sessions Judge. Act XLVI of 1952 only indicates that the Legislature preferred the second alternative. It could not have appointed these special officers as Sessions Judges, for the term "Sessions Judge" connotes a particular type of officer created by section 9 of the Criminal Procedure Code, which runs as follows :

"(1) The State Government shall establish a Court of Session for every sessions division, and appoint a Judge of such Court."

It could, therefore, only confer the status of a Sessions Judge on these Special Judges by directing that the court of these Special Judges shall be deemed to be a court of session. This intention in my opinion is clearly and fully expressed in Act XLVI of 1952.

I now take up the provisions of the Criminal Law Amendment Act, 1952. The Special Judges are appointed under section 6 of this Act and sub-section (2) of this section runs as follows :

“A person shall not be qualified for appointment as a Special Judge under this Act unless he is, or has been, a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1898 (Act V of 1898).”

It would be seen from this that a magistrate even of the highest grade, i.e., the Presidency Magistrate is not qualified to be appointed as a Special Judge. I have drawn attention to this fact because in my opinion it gives an indication of the intention of the Legislature. It is clearly expressed subsequently in section 8 of the Act, namely, that “the court of the Special Judge shall be deemed to be a court of session”. Where only Sessions Judges, acting or retired, were to be appointed as Special Judges, it is an indication that the Legislature intended to confer the status of a Sessions Judge on these officers.

Then comes section 8, which is the most important section in this enactment. It runs as follows :

- “(1) A Special Judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898 (Act V of 1898), for the trial of warrant cases by magistrates.
- (2) A Special Judge may with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof, and

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any pardon so tendered shall, for the purposes of sections 339 and 339-A of the Code of Criminal Procedure, 1898, be deemed to have been tendered under section 338 of that Code.

- (3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1898, shall, so far as they are not inconsistent with this Act, apply to the proceedings before a Special Judge ; and for the purposes of the said provisions, the court of the Special Judge shall be deemed to be a court of session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a Special Judge shall be deemed to be a public prosecutor.
- (4) A Special Judge may pass upon any person convicted by him any sentence authorized by law for the punishment of the offence of which such person is convicted."

The very opening sentence of sub-section (1) gives an indication of the intention of the Legislature. It is only to the Court of Session that an accused is committed and there was no point in giving a direction that the Special Judge may take cognizance of a case without any commitment proceedings, if he was a magistrate, for cases are not committed to the courts of magistrates. This specific direction was incorporated in the statute to stress the fact that a departure from the normal rule of procedure was being made and though the Special Judge was not a magistrate but an officer deemed to be a Sessions Judge, yet for the limited purposes of trial he should follow the procedure laid down in Chapter XXI of the Criminal Procedure Code. I have already given my reasons above why the procedure of a sessions trial was wholly unsuitable for these courts. In my opinion it is an error to think that because the Special Judges were directed to follow the procedure prescribed for warrant cases, they ceased to be Judges and became magistrates.

It was perhaps to clarify this point that the status of the Special Judge was expressly mentioned in the succeeding sections.

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The words "shall follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by magistrates" again in my opinion indicates that the direction was confined to observe the procedure laid down in Chapter XXI of the Criminal Procedure Code. This Chapter is entitled "of the trial of warrant cases by Magistrates" and section 251, Criminal Procedure Code, which is the first section of this Chapter clearly defines what is meant by the phrase "Procedure in warrant cases". Section 251, Criminal Procedure Code, runs as follows :

*"Procedure in warrant cases—*In the trial of warrant cases by magistrates, the magistrates shall—

- (a) in any case instituted on a police report, follow the procedure specified in section 251-A, and
- (b) in any other case, follow the procedure specified in the other provisions of this Chapter".

It seems to me that when the Special Judges were directed to follow the procedure prescribed for the trial of warrant cases, this direction was limited to the provisions of section 251 cited above and for all other purposes the Special Judges stood on the same footing as the Sessions Judges and the same provisions of the Criminal Procedure Code applied to both. In my opinion the words of sub-section (1) of section 8 do not warrant the inference that the other provisions of the Code of Criminal Procedure outside Chapter XXI, which were applicable to a trial held by a magistrate, also applied to the trial conducted by the Special Judge.

Sub-section (2) of section 8 further illustrates the status of the Special Judge. Under the Criminal Procedure Code a pardon can be tendered to an approver both by a magistrate and by a Sessions Judge. When the

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Magistrate does so, he acts under section 337, Criminal Procedure Code, but where the Sessions Judge tenders this pardon, he functions under section 338, Criminal Procedure Code. These two sections are in Chapter XXIV of the Criminal Procedure Code—the same Chapter in which section 350 occurs. By making it clear that the pardon tendered by the Special Judge shall be deemed to have been given under section 338, the Legislature has again given an express indication that the Special Judge is not to be classed as a magistrate, but as a Sessions Judge. If the Legislature intended that the Special Judge was to be grouped amongst the magistrates, it would have mentioned section 337 instead of section 338 in this sub-section. It was necessary to include this sub-section because the opening words of section 338, "At any time after commitment" made it inapplicable to the Special Judge as there were no commitment proceedings in cases that come before him.

Sub-section (3) of section 8 makes the position still more clear. It states that excepting the provisions of sub-sections (1) and (2), the other provisions of the Code of Criminal Procedure, which are not inconsistent with this Act, will apply to the proceeding before the Special Judge and his court shall be deemed to be a court of session. In other words, excepting the mode of trial prescribed in sub-section (1), all the other provisions of the Criminal Procedure Code which apply to the court of the Sessions Judge shall apply to the court of the Special Judge. I have given my reasons earlier why the mode of trial had to be changed and the Special Judge could not follow the procedure of a sessions trial. I have also given my opinion while dealing with sub-section (1) that its ambit was confined to Chapter XXI, Criminal Procedure Code, and it did not extend beyond it. The provisions of section 350, Criminal Procedure Code, cannot in my opinion be brought within the scope of sub-section (1). The very fact that in sub-section (2) the Special Judge was classed with the Sessions Judges and not with the magistrates is a clear indication that for the purposes of Chapter XXIV of the Code of Criminal Procedure, he is not to be grouped with the magistrates.

I will now take up the words "shall be deemed to be a court of session" for the Madras view has been largely influenced by an interpretation of these words. The phrase "shall be deemed" is frequently used in statutes when the Legislature wants to confer a status or an attribute to a person or thing which is not intrinsically possessed by that person or thing on whom this conferment is made. As observed by CURGENVEN, J., in *T. S. Ramabhadra Odayar v. T. S. Gopalaswami Odayar* (1):

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"No doubt the phrase 'deemed to be' is commonly used in statutes to extend the application of a provision of law to a class not otherwise amenable to it."

The true synonym for the word "deemed" is "judged" and the other shades of meaning came later. Even to-day the Judges in the Isles of Man and Jersey are called "Deemsters". Whenever the word "deemed" is used in statute in relation to a person or thing, it implies that the Legislature after due consideration exercised its judgment in conferring that status or attribute to a person or thing. In *De Beauvoir v. Welch* (2) LITTLEDALE, J., observed:

"The word deemed imports also that a judgment is to be exercised,"

In the context of this sub-section the word "deemed" imports that a judgment has been exercised. The question, therefore, arises whether it is open to a court to sit in judgment over the judgment of the Legislature and ignore the express direction contained in the statute on the ground that the person on whom a status is conferred by statutory fiction is not the real person and so it can refuse to recognize him as such a person. In my opinion this approach is not open to a court. The important thing is not the meaning of the word "deemed" but the effect of its use in the statute. In the *Law Lexicon of*

(1) (1930) 59 M.L.J. 809.

(2) (1827) E. R. 108.

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British India by P. Ramanatha Aiyar, (1940), under the words "deemed to be", the following extract appears :

"In *Leonard v. Grant* (1), it is said : Whatever an Act requires to be 'deemed' or 'taken' as true of any person or thing, must, in law, be considered as having been duly adjudged or established concerning such person or thing and have force and effect accordingly."

I have quoted this extract from the Law Lexicon because I could not find this decision in the books which were available to me. To the same effect are the observations of VISCOUNT DUNEDIN, in *Commissioner of Income-tax, Bombay v. Bombay Trust Corporation, Ltd.* (2) :

"Now when a person is 'deemed to be' something, the only meaning possible is that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if he were".

It, therefore, cannot be doubted that when the Legislature directed that the court of the Special Judge shall be deemed to be a court of session, the courts of law had no option but to follow the direction of the statute and to regard the court of the Special Judge as a court of session irrespective of the fact whether he was in essence a Sessions Judge or not.

The observations of CAVE, J., in *The Queen v. Norfolk County Council* (3) cited in the Madras decision are also not helpful in my opinion to the view expressed in that case. The last sentence of the extract quoted is :

"... that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing".

At this stage CAVE, J., was only giving meaning of the words "deemed to be". A few lines later, when he discussed the effect of these words, he observed :

(1) 5 Fed. 11,16.

(2) A.I.R. 1930 P. C. 54, 55.

(3) L.J. [1891] 60 Q.B. 379.

"Still, that does not entitle us to go outside what appears to me to be the clear language of the statute . . . "

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It, therefore, seems to me that where the statute uses the words "deemed to be", it may be a creation of an artificial status, but the courts cannot challenge it and must accept it.

Lastly, I find that the word "deemed" has been used once in sub-section (2) and twice in sub-section (3). The same meaning must be given to it everywhere and it cannot be contended that while the fiction created is acceptable in the other two places it is not so in the third place. The last sentence of sub-section (3) runs as follows :

"The person conducting a prosecution before a Special Judge shall be deemed to be a public prosecutor."

This implies that the provision of Chapter XXXVIII of the Code of Criminal Procedure will apply to such a person and a court cannot refuse to acknowledge this merely because the person conducting the prosecution before the Special Judge is not a duly appointed public prosecutor under the Criminal Procedure Code. It, therefore, naturally follows that the provisions of the Criminal Procedure Code applicable to a sessions trial, apart from the exception made in sub-section (1), will apply to a trial before the Special Judge. Section 350, Criminal Procedure Code, being a general provision, which is not included in Chapter XXI of the Code of Criminal Procedure, will, therefore, not apply to a trial before the Special Judge.

Sub-section (4) extends the power of the Special Judge to award the maximum punishment under the law up to the same extent as that of any Sessions Judge and this again clearly indicates that the Special Judges cannot be treated as magistrates.

Lastly, I will deal with section 9. The Madras view was that if the Special Judges were to be regarded as

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Sessions Judges, this section becomes a surplusage. Perhaps the provisions of section 408 (b), Criminal Procedure Code, escaped the attention of the learned Judges when they expressed this view. Under sub-section (3) the direction given was that the court of the Special Judge shall be deemed to be a court of session. The term "court of session" includes the courts of the Sessions Judge, the Additional Sessions Judge and also the Assistant Sessions Judge, for the same procedure is followed in trials before all these courts.

Normally the Sessions Judge hears the appeals filed against the decisions of the Assistant Sessions Judge, unless the sentence inflicted is four years or more. In order to clarify the position that an appeal from the decision of the Special Judge shall in no case lie before the Sessions Judge, it was necessary to add this section. Without this section a doubt might have arisen that in those cases where the Special Judge awarded a sentence of less than four years, the appeal lay before the Sessions Judge under section 408 (b) of the Code of Criminal Procedure. This section, therefore, instead of being a surplusage again indicates the intention of the Legislature to confer the status of a Sessions Judge upon these Special Judges.

For the reasons mentioned above, I am of the opinion that the Criminal Law Amendment Act, (Act XLVI of 1952), has created Special Judges who differ from the Sessions Judges only in this respect that they follow a different mode of trial, but all the other provisions of the Criminal Procedure Code apply to both alike. They cannot be classed as magistrates and section 350 of the Code of Criminal Procedure is not applicable to them. The order passed by Sri Shah Ghyas Alam is, therefore, correct, in my opinion, and must be upheld. These two applications of criminal revision are dismissed and the stay orders passed are vacated.

By the Court—Both the applications are hereby dismissed and the stay orders passed are vacated.

Applications dismissed.

APPELLATE CIVIL

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November,

*Before Mr. Justice Mukerji and Mr. Justice Singh**

RAJA SHRI AMAR KRISHNA NARAIN SINGH
(PLAINTIFF)

v.

DEPUTY COMMISSIONER, BARA BANKI, AS
MANAGER OF COURT OF WARDS, GANESH-
PUR ESTATE, BARA BANKI (DEFENDANT)

Court of Wards — Properties of both the wards under the superintendence of the Court of Wards—Litigation between wards—Compromise, validity of—U. P. Court of Wards Act, 1912, s. 56, applicability of.

A First Appeal no. 99 of 1947 was filed by the Court of Wards representing Rani Drig Raj Kunwar's estate in Bara Banki against Amar Krishna Narain Singh who also filed a First Appeal no. 2 of 1948 in the Chief Court. On 8th February, 1950, the Deputy Commissioner of Bara Banki assumed superintendence of the property of Amar Krishna Narain Singh and thus the properties of the two warring estate-holders, Rani Drig Raj Kunwar and Amar Krishna Narain Singh, vested in one single hand, namely, that of the Deputy Commissioner of Bara Banki. The estate of Rani Drig Raj Kunwar was called the Ganeshpur Estate and the estate belonging to Amar Krishna Narain Singh was called the Ramnagar Estate. A compromise was arrived at on 25th April, 1952, and the court passed a decree in terms of that compromise. The above appeals were disposed of accordingly. The translation and printing of the record in the above two appeals did not proceed owing to the compromise. Rani Drig Raj Kunwar has now applied for the preparation of the paper book alleging the decrees passed in the above two appeals to be of no effect.

Held, (i) that the position of a ward is not the same as the position of a minor at law and the authorities, which lay down that any decree obtained against a minor when such a minor is not properly represented in the suit would be a nullity, would have no application to the case of a decree obtained against a ward if there was any procedural error in regard to representation in the suit under the provisions of the Court of Wards Act,

(ii) that the real representation of each of the two contesting wards remained vested in the Court of Wards and that the Court of Wards remained the ultimate authority under the law to act on behalf of the wards.

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Mussammat Bibi Walian v. Banke Behari Pershad Singh (1)

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(iii) that the question whether the compromise was detrimental to the interest of any of the parties to it or not was not a question that could be investigated in these proceedings; it can only be done by a separate suit.

(iv) that the mere fact that the compromise has been made in a suit in which representatives for the two contesting wards had not been appointed did not make the compromise unlawful for there is no provision in the Court of Wards Act specifically enjoining that a compromise could be effected between two rival wards only through their appointed representatives and not otherwise.

Mirza Husain Yar Beg v. Radha Kishan (2), *Jagan Nath v. Jaswant Singh* (3) relied on.

(v) that the compromise had been entered into on the one hand on behalf of Rani Drig Raj Kunwar by the Deputy Commissioner in charge of her estate and on the other, on behalf of Raja Amar Krishna Narain Singh by the Deputy Commissioner in charge of his estate; these must be held to be two legally distinct personalities even though the two happened to vest in the same individual.

(vi) that there was no failure on the part of the Court of Wards to apply its mind to the question whether the act is for the benefit of the property or the advantage of the Wards or that the action of the Court of Wards was not *bona fide*. An attack on the compromise on the grounds above mentioned can only make the compromise voidable and not void *ab initio*.

Karanpura Development Co., Ltd. v. Kamakshya Narain Singh (4).

First Appeal No. 2 of 1948 from a decree of Yaqub Ali Rizvi, Additional District Judge of Lucknow.

The facts appear in the judgment.

Niamatullah and *Ali Hasan* for the applicant.

Iqbal Ahmad, *Bishun Singh* and *M. L. Tilhari* for opposite party.

The judgment of the Court was delivered by—

MUKERJI, J. :—This is an application on behalf of Rani Drigraj Kuar, widow of Raja Harnam Singh, praying that the work of the preparation of the paper book

(1) (1902-03) L.R. 30 I.A. 182.

(2) A.I.R. 1935 All. 137.

(3) A.I.R. 1954 S.C. 210, 212.

(4) A.I.R. 1956 S.C. 446.

under Chapter XIII of the Rules of Court may be resumed from the stage at which it was interrupted on account of the passing of certain decrees which should be treated as being without effect.

The prayer in the application looks innocuous, but the effect of granting that prayer would mean the ignoring of the existence of two decrees of this Court passed on the basis of a certain compromise made on the 25th April, 1952.

In order to appreciate the scope of the prayer and the arguments on which the prayer was claimed it is necessary to state some facts.

One Raja Sarabjit Singh was a taluqdar of some status and position. He died some time in the year 1898, leaving behind a son, Raja Udit Narain Singh, who succeeded to his estate. It may be mentioned at this stage that the Rule of Primogeniture applied to the succession in respect of the estate which was owned by Raja Sarabjit Singh, in so far as Raja Sarabjit Singh was mentioned as one of the taluqdars in list 2 of Act I of 1869.

Raja Udit Narain Singh died on the 5th June, 1927, leaving a will, dated the 2nd September, 1925. At Raja Udit Narain Singh's death, he left behind two sons, Raja Harnam Singh, the elder son, and Kunwar Sarnam Singh, the younger son. Under the will of Raja Udit Narain Singh the elder son Harnam Singh, who was at that date issueless, was to succeed to the estate for life, without power of alienation except in regard to seven villages specified in the will, which were to go to him as a full heir with powers of transfer, etc. After the death of Harnam Singh the estate was to devolve on Kunwar Sarnam Singh, but that too for life, and thereafter the estate was to vest in the son of Sarnam Singh, namely, Amar Krishna Narain Singh. The will further declared that a village called Bichalka was to go to Rani Drigraj Kaur, the applicant, who was the wife of the elder son of Raja Udit Narain Singh, since that village had been given to her by way of a wedding present

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1957 termed *runumai* for life. The will, further provided for a maintenance (*guzara*) of Rs.500 a month for life to Rani Drigranj Kuar : this sum was made a charge on the estate.

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The will had a schedule attached to it, of the properties covered by the will, but somehow this schedule omitted to mention five villages which admittedly formed part of the estate of Raja Udit Narain Singh. The applicant averred that this may have been either by accident or by design.

The aforementioned will of Raja Udit Narain Singh was deposited with the District Judge of Faizabad, under a sealed cover. This was opened after the death of Udit Narain Singh, which took place on the 5th June, 1927, and was subsequently registered.

On the death of Raja Udit Narain Singh, Harnam Singh succeeded to the estate. Sarnam Singh was in service of Government as a Deputy Collector. Nevertheless, he possessed a number of villages which appear to have come to him otherwise than under the will or as part of his father's estate.

Raja Harnam Singh died on the 9th January, 1935, leaving behind his widow Rani Drigranj Kaur, who is the applicant before us. Raja Harnam Singh had executed a registered will on the 26th February, 1953, by which he left all the properties, cash, movable and immovable, over which he had any disposing power, to his wife absolutely. The will expressly conveyed a number of villages, including the seven villages which had come to Harnam Singh absolutely under the will of his father. The five villages which did not figure in the schedule of the estate attached to the will of Raja Udit Narain Singh were also given by him to his wife by the will. The right under which Raja Harnam Singh appears to have made a bequest of the five villages not mentioned in the schedule of Raja Udit Narain Singh's will, appears to have been based on the ground that as the eldest son he succeeded to those villages in intestacy. Raja Harnam Singh also executed a deed of gift on the 8th

July, 1933, in favour of his wife Rani Drigraj Kuar, by which he transferred most of the immovable properties which had been covered by the will, this gift also included several houses which were alleged to have been owned by him.

As fate would have it, Sarnam Singh predeceased his elder brother, for he died sometime in the year 1928, while Raja Harnam Singh did on 9th January, 1935.

On Raja Harnam Singh's death, dispute arose between his widow, Rani Drigraj Kuar, the present applicant, and Sarnam Singh's widow, Parvati Kuar, acting as guardian for her minor son, Amar Krishna Narain Singh. It appears that the then Deputy Commissioner, Bara Banki, within whose jurisdiction the estate of the parties fell, interceded and the disputes which had cropped up in the family were settled and a deed of family settlement was duly drawn up with the approval of the District Judge of Bara Banki, on the 22nd January, 1935. By this deed of settlement or family arrangement all the depositions which had been made by Raja Harnam Singh either by his will or gift, except as regards some villages, were confirmed. The exception appears to have been made in respect of those villages which had been mentioned in the schedule to the will of Raja Udit Narain Singh and in which Raja Harnam Singh had only been given a life estate.

It appears that the family settlement of 1935 survived the cupidity of parties only for a period of a little over eight years, because in 1943 two suits were filed, one by Amar Krishna Narain Singh and the other by Rani Drigraj Kuar.

The suit of Amar Krishna Narain Singh was filed on the 6th September, 1943, that is to say, just within three years of his attaining majority. By this suit, Amar Krishna Narain Singh sought to have the family settlement set aside and to get possession over everything that was with Rani Drigraj Kuar. He also claimed a very large sum of money, about sixteen lakhs, which the Rani was alleged to have possessed as part of the family estate. In this suit an injunction appears to have been obtained freezing all the assets of the Rani.

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On the 16th December, 1943, Rani Drigraj Kuar filed a suit for a declaration of her rights under the will and the gift of Raja Harnam Singh—this apparently was by way of a counter-blast to Amar Krishna Narain Singh's suit. Both the suits were connected and went to trial together. The suits were transferred for trial to a Special (Taluqa) Judge, who was appointed to try such suits.

During the pendency of the aforementioned two suits certain events of grave consequences occurred. One such event was that Rani Drigraj Kuar went off her mind and was declared a lunatic by the District Judge under the Lunacy Act on the 12th November, 1945. As a consequence of the declaration of the District Judge under the Lunacy Act, the estate possessed by Rani Drigraj Kuar was taken over by the Court of Wards under the provisions of section 8 (1) (c) of the U. P. Court of Wards Act, 1912, as amended by Act no. V of 1933.

The aforementioned suits appear to have been decided by the Taluqa Judge, some time in 1947. By his decision the Judge decreed Amar Krishna Narain Singh's suit for the recovery of two villages, Gopalpur and Gayapur, (which were items nos. 13 and 14 of Schedule A), only, with the right to recover mesne profits for the same against Rani Drigraj Kuar. The rest of Amar Krishna Narain's claim was dismissed with proportionate costs to Rani Drigraj Kuar. Since Amar Krishna Narain Singh's suit failed mainly on the ground that the family arrangement was upheld, the suit of Rani Drigraj Kuar, as a necessary corollary, was dismissed.

Two appeals were filed against the two decrees mentioned above. Since the estate of Rani Drigraj Kuar was under the superintendence of the Court of Wards, an appeal which was to enure to her benefit was filed by the Deputy Commissioner, Bara Banki, representing Drigraj Kuar's estate. This appeal was First Appeal no. 99 of 1947. Amar Krishna Narain Singh filed another appeal, which was First Appeal no. 2 of 1948, and by that appeal he challenged that part of the

decree by which his claim in regard to other properties, save Gopalpur and Gayapur, had been dismissed. Both the appeals were filed in the erstwhile Chief Court of Avadh.

The second significant event that happened took place on the 8th February, 1950, when Amar Krishna Narain Singh's estate was taken over by the Court of Wards. It appears that Amar Krishna Narain Singh made an application to the Collector to take over his property under the superintendence of the Court of Wards. As has been pointed out earlier, the estate of Amar Krishna Narain Singh was taken over under the superintendence of the Court of Wards on the 8th February, 1950, presumably because the Court of Wards was satisfied that it was expedient to undertake the management of such property and a declaration to that effect was made. After the assumption by the Court of Wards of the estate of Krishna Narain Singh, the Deputy Commissioner of Bara Banki also became in charge of this estate. The position, therefore, was that after the 8th February, 1950, the two warring estate-holders, Rani Drigranj Kuar and Amar Krishna Narain Singh vested in one single hand, namely, that of the Deputy Commissioner of Bara Banki. It is interesting to note at this stage that the two estates about this time got two separate names—the estate belonging to Rani Drigranj Kuar was called the Ganeshpur Estate, while the estate belonging to Amar Krishna Narain Singh was called the Ramnagar Estate. It may also be pointed out here that after the resumption by the Court of Wards of the estate of Amar Krishna Narain Singh, the Deputy Commissioner of Bara Banki was substituted in place of Amar Krishna Narain Singh as appellant and respondent respectively in the two appeals.

It appears that the Court of Wards felt that it would be waste of money, and more or less futile, for two of its wards to litigate when their disputes could be settled amicably. Attempts, therefore, were made and a settlement appears to have been arrived at. Whether the settlement had been arrived at by the parties or had been

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arrived at properly or was a fair and proper settlement are not questions about which we should be taken to pronounce at this stage, for all which we wish to state here is that factually a settlement was arrived at and a compromise in terms of that settlement was put into court in the appeals which were pending on 25th April, 1952. It appears further that the court passed a decree in terms of that compromise and the appeals were disposed of accordingly. Before the compromise had been put in into court, certain proceedings apparently had been taken towards the translation and printing of the record and, therefore, those proceedings remained at the stage up to which they had reached.

Paragraph 5 of this compromise is material and we shall now quote it :

“ That the parties in both the above appeals have adjusted their disputes by a compromise which is as follows :

- (a) The Deputy Commissioner, Bara Banki, in charge Court of Wards, Ganeshpur Estate, (appellant in F. C. Appeal no. 99 of 1947 and respondent in F. C. Appeal no. 2 of 1948), will pay Rs.2,25,000 to the Deputy Commissioner, Bara Banki in charge Court of Wards, Ramnagar Estate, district Bara Banki, (appellant in F. C. Appeal no. 2 of 1948 and respondent in F. C. Appeal no. 99 of 1947), within two months.
- (b) That henceforth Kothi no. 21 situate at Railway Station Road, Lucknow, bound-
ed as below and claimed as item no. 19 in Schedule A, in suit no. 58 of 1943 be owned with all proprietary rights and interest by Raja Shri Amar Krishna Narain Singh now represented by appellant in F. C. Appeal no. 2 of 1948. The actual possession of this building with all its appurtenances, compound

- and outhouses, etc. is also delivered to Raja Shri Amar Krishna Narain Singh.
- (The boundaries of Kothi no. 21 are now given which we do not think necessary to quote.)
- (c) That the decrees about the villages Gagiapur and Gopalpur in favour of Raja Shri Amar Krishna Narain Singh would be binding upon Rani Drigraj Kuar now represented by the Deputy Commissioner, Bara Banki, in charge Court of Wards, Ganeshpur Estate, district Bara Banki. Raja Shri Amar Krishna Narain Singh now represented by the Deputy Commissioner, Bara Banki, in charge Court of Wards, Ram Nagar Estate, district Bara Banki, relinquishes his claim about mesne profits.
- (d) That village Bichilka be decreed as reverting to Raja Shri Amar Krishna Narain Singh now represented by the Deputy Commissioner, Bara Banki, in charge Court of Wards, Ramnagar Estate, district Bara Banki, on the death of Rani Drigraj Kuar now represented by the Deputy Commissioner, Bara Banki, in charge Court of Wards, Ganeshpur Estate, district Bara Banki.
- (e) That F. C. Appeal no. 99 of 1947 should be allowed to be withdrawn and Raja Shri Amar Krishna Narain Singh be recognized as the full and absolute owner of all the properties claimed therein."

Mr. *Niamatullah* appearing on behalf of Rani Drigraj Kuar in support of her petition severely criticized the wisdom and the fairness of the compromise. He stated that by this compromise interest of the Rani had been jeopardised and that she was deprived of much of what she had gained by the family settlement as also by the

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result of the dismissal of the suit which had been filed by Raja Amar Krishna Narain Singh. It was pointed out by Mr. *Niamatullah* that if nothing else, by this compromise the estate which Rani Drigraj Kuar got in village Bichilka was restricted to a life estate only. It was further contended by him that by virtue of paragraph 5 (e) of the compromise quoted above Rani Drigraj Kuar appeared to lose all along the line. Mr. *Niamatullah* strenuously contended that this position was brought about because of the fact that the two estates had fallen for management under a single hand, namely, that of the Deputy Commissioner, Bara Banki, and consequently proper assessment of the rights of Rani Drigraj Kuar was not made, since she was a female lunatic having no independent advice or support for her cause. Sir *Iqbal Ahmad*, on the other hand, equally vehemently contended that everything in regard to this compromise was fair and above board and that the compromise had not only been properly brought into existence but was a fair and equitable settlement under the circumstances of the case. It was pointed out that with the abolition of Zamindari in the offing the wards had nothing to gain but everything to lose by costly litigation being prolonged. For our purposes, however, it is not necessary to go into the question whether the compromise was a proper compromise, entered into fairly and properly, because the argument on which relief was claimed in this petition was based not on the validity or otherwise of the compromise but on the fact that there was no jurisdiction or power in the Deputy Commissioner of Bara Banki as in charge of the two estates, Ganeshpur Estate of Rani Drigraj Kuar and the Ramnagar Estate of Amar Krishna Narain Singh, to enter into a compromise. We shall, therefore, not express any opinion about the merits of the compromise but shall confine ourselves to the latter argument which it would be necessary to elaborate further in order to appreciate its true scope.

It was contended that whenever two wards figured as opposite parties in any suit or proceedings and had conflicting interests, then it was obligatory on the Court of Wards to appoint for each ward a representative and

that it was within the special and exclusive power of that representative to conduct or defend the case on behalf of the ward whom he represented. It was pointed out that admittedly no representatives had in fact been appointed for the two wards who were litigating because of their conflicting interests and, therefore, any compromise which was conceived and brought into existence by the Court of Wards and subsequently filed in court was without any power and as such a nullity. Reliance was placed for this contention on the provisions of section 56 of the Court of Wards Act. Section 56 is in these terms :

“When in any suit or proceeding two or more wards, being parties have conflicting interests, the Court of Wards shall appoint for each such ward a representative, and the said representative shall thereupon conduct or defend the case on behalf of the ward whom he represents, subject to the general control of the Court of Wards.”

It was contended that the position of a ward was analogous to that of a minor and it was further contended that as in the case of a minor an improper representation meant no representation in law and a non-representation of a minor in litigation made the decree obtained in such a litigation a nullity, similarly, where a ward was not represented properly in court within the provisions of section 56, any decree in such a suit was a nullity. Reliance was placed on certain decisions which indicated that where the appointment of a minor was invalid, then in such a case the decree was void and it was not necessary to file a suit to get a declaration that such a decree was void but that such a decree could just be disregarded because under the law such a decree could not be deemed to have any existence.

Reliance was placed largely on the case of *Nathumal v. Mohd. Nazir Beg* (1), where the learned CHIEF JUSTICE and AGARWAL, J., held that where in a suit not only the service of notice on the proposed guardian is defective but no order is made by the court under Order XXXII,

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rule 3, a decree passed against the minor in such circumstances is void and may be ignored. It was further pointed out in this case, and on this proposition much reliance is also placed by *Mr. Niamatullah*, that a void decree is a decree which has no existence in the eye of law and may be ignored and, therefore, it was not necessary to file a suit to have the decree declared void. We are in respectful agreement with the view expressed in *Nathumal's* case. The question before us is not whether the decree which is obtained against a minor who had no proper guardian was a proper decree or not or whether it was necessary to have such a decree set aside in a suit or whether such a decree would be ignored. The point that is before us is whether, *firstly*, the position of a ward is precisely the same as the position of a minor in a suit and, *secondly*, whether the representative contemplated under section 56 stands on the same footing in law as a guardian *ad litem* of a minor does. If the position is different, then obviously the decision in *Nathumal's* case and such other similar cases would have no application but if the position were identical, then these cases would undoubtedly apply. We have, therefore, to see what exactly is the position. When an estate is taken over by the Court of Wards, then the whole of the movable and immovable property of a ward gets under the superintendence of the Court of Wards. The Collector or other person appointed is to take possession and custody of the property and is to manage it in accordance with the rules made under section 64 of the Act. Any property which a ward may inherit subsequent to the date of the assumption or declaration is also deemed to be under the superintendence of the Court of Wards. The Court of Wards have further the discretion to assume or refrain from assuming the superintendence of any property which the ward may acquire otherwise than by inheritance subsequent to the date of such assumption or declaration—this is provided for by section 16 of the Court of Wards Act.

Under section 55 of the Court of Wards Act no ward can sue or be sued, nor can any proceedings be taken in

the civil court otherwise than by and in the name of the Collector in charge of his property or such other person as the Court of Wards may appoint. A ward, therefore, is strictly speaking not in the same position as a minor is. A minor under the law is incompetent to enter into any kind of contract because of his inherent incapacity, namely, the incapacity born out of immaturity of mind. The disability which a ward suffers, on the assumption of his estate by the Court of Wards, does not embrace the entire field of his contractual competency. The disabilities which a ward suffers on the resumption of his estate are enumerated in section 37 of the Act. The terms of that section clearly indicate that the ward's incapacity relates in essence to his capacity to deal with that estate of his which is under the superintendence of the Court of Wards and to his incurring any financial liabilities under any contract. The ward is left free to deal with his property under certain conditions; a ward whose estate has been taken over under section 10 of the Act can make an adoption without the consent of the Court of Wards as also make a testamentary disposition in regard to his property. Even when an estate is taken over by the Court of Wards under the provisions of section 8, it appears that the power to make an adoption or testamentary disposition of property is vested in the ward, subject, of course, to the consent to the Court of Wards, which consent, however, is not to be withheld if the adoption or the testamentary disposition is not contrary to the personal or special law applicable to the ward, or it does not appear that such acts were likely to cause pecuniary embarrassment to the property or lower the influence or respectability of the family in public estimation: this is so provided by the first proviso to section 37 of the Act. A consideration of the aforequoted provisions makes it perfectly plain that the position of a ward is not the same as the position of a minor at law, so that those authorities, which lay down that any decree obtained against a minor, when such a minor was not properly represented in the suit, would be a nullity, would have no application to the case of a decree obtained against a ward, if there was any

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procedural error in regard to representation in the suit under the provisions of the Court of Wards Act.

What was contended by *Mr. Niamatullah* was that under the provisions of section 56 of the Act the two wards in this case, viz., Rani Drigraj Kuar on the one hand and Raja Amar Krishna Narain Singh on the other, had to be represented in the suit by separate representatives appointed by the Court of Wards for the conduct and defence respectively of the case on behalf of each ward. It was contended further that the provision was a mandatory provision and if there was the slightest breach of any part of that provision, then the decree, whether it was a consent decree or a decree in compromise or a decree after contest, was a nullity. It is no doubt true that section 56 says in terms that the Court of Wards *shall* appoint for each ward a representative : the question is whether the use of the word "shall" in section 56 makes it so obligatory on the Court of Wards to appoint representatives that their non-appointment has the effect of vitiating the entire trial and the result thereof. It is one of the well-recognized rules of interpretation that if a provision is mandatory it should be held to be non-mandatory unless non-compliance with the provision was visited with some penalty. [See the decision of the Supreme Court in *Jagan Nath v. Jaswant Singh* (1)]. There is in the Court of Wards Act no penalty provided for non-compliance with the provision of section 56. We are, therefore, of the opinion that a non-compliance with this provision could not lead to the decree, which was a compromise decree in this case, to be void.

The reason for incorporating section 56 in the Act appears to have been with the idea of avoiding any embarrassment to the officers of the Court of Wards who may have had the task in certain cases of representing rival interests. It is significant to note that even though separate representatives were to be appointed to represent the interests of the two rival wards, the general control over those representatives was vested in the

(1) A.I.R. 1954 S.C. 210, 214.

Court of Wards. It is, therefore, plain that the real representation of each of the two contesting wards remained vested in the Court of Wards and that the Court of Wards remained the ultimate authority under the law to act on behalf of the wards. In the case of *Mussammatt Bibi Walian v. Banke Behari Pershad Singh* (1) their Lordships of Privy Council held that where it appeared that in a suit the minors' interests were effectively represented by their mother with the sanction of the court, the absence of the formal order appointing her and an immaterial defect of service of summons on the minors and their guardian, which did not cause any real prejudice, were mere irregularities which could form no ground for reversing the judgment and execution proceedings on appeal or in a separate suit for the purpose. That there was effective representation of the interests of the ward in this case admits of little doubt, for it is clear from the documents filed that there was a good deal of negotiation and consideration given before the compromise actually was put into court and made the rule of court.

Mr. Niamatullah contended that the compromise was on its merits detrimental to the interests of his client, namely, Rani Drigraj Kuar. In our view the question, whether the compromise was detrimental to the interest of any of the parties to it or not, was not a question that could be investigated in these proceedings. If an investigation of such a question is to be made, then it could in our view be made by a separate suit, for if *Mr. Niamatullah's* contention were right, then the decree could at best be a voidable decree and not a void decree *ab initio*. It was further contended by *Mr. Niamatullah* that a fraud was practised on the court inasmuch as the court was not told when it made the compromise decree that the compromise had not been arrived at by representatives who should have been appointed under the provisions of section 56 of the Court of Wards Act. We cannot agree with this contention, for in our opinion there was no occasion or

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necessity to draw the attention of the court to that fact. All that the court had to be satisfied was that a compromise, which was not otherwise unlawful, had been entered into. The mere fact that the compromise had been made in a suit in which representatives for the two contesting wards had not been appointed did not make the compromise unlawful, for there is no provision in the Court of Wards Act specifically enjoining that a compromise can be effected between two rival wards only through their appointed representatives and not otherwise. In *Mirza Husain Yar Beg v. Radha Kishan* (1) a Bench of this Court held that the word "lawful" in Order XXIII, rule 3, refers to agreements which in their very terms or nature are not unlawful and may, therefore, include agreements which are voidable at the option of one of the parties thereto because they had been brought about by either undue influence, coercion or fraud. It was further held in this case that a party alleging fraud cannot be allowed to avoid a compromise admittedly executed by it in proceedings started by an application under Order XXIII, rule 3 of the Code of Civil Procedure. This view has since been reiterated in this Court in other cases.

Mr. Niamatullah further contended that a compromise must be the act of two parties to it and unless there are two parties to a compromise, such a compromise can in law be no compromise. He contended that since the compromise had been entered into really by the Deputy Commissioner of Bara Banki, there were no two parties to this compromise. This argument, in our opinion, is not correct for the compromise had been entered into on the one hand on behalf of Rani Drigraj Kuar by the Deputy Commissioner in charge of her estate and on the other, on behalf of Raja Amar Krishna Narain Singh by the Deputy Commissioner in charge of his estate—these must be held to be two legally distinct personalities even though the two happened to vest in the same individual. The Court of Wards have been given power under section 61 (4) of the Act to execute all

deeds, contracts and other instruments between two wards and such deed, contract or other instrument was specifically made valid under the Act. Under section 38 of the Court of Wards Act, the Court of Wards have been given plenary powers in regard to dealing with the property of the ward; the Court of Wards have been empowered to do all such acts as are not inconsistent with the other provisions of the Act or any other Act in force for the time being "as it may judge to be" for the advantage of the ward or for the benefit of his property. Section 18 of the Bengal Court of Wards Act (no. IX of 1879) had similar words as in section 38, namely, "as it may judge most for the benefit of the property and the advantage of the ward", and their Lordships of the Supreme Court in the case of *Karanpura Development Co., Ltd. v. Kamakshya Narain Singh* (1) had occasion to express their opinion in regard to these words and their Lordships said that the words "as it may judge most for the benefit of the property and the advantage of the ward" in section 18 cannot be construed as equivalent to "as may be judged to be most for the benefit of the property and the advantage of the ward". The statute confides in clear and unambiguous terms the authority to judge whether the act is beneficial to the estate, to the Court of Wards and not to any outside authority. Their Lordships further pointed out that exercise of such a power can be attacked on the ground that the Court of Wards did not act *bona fide* and in the interest of the ward and that its action amounted to a fraud on the power, and it could also be attacked on the ground that the Court of Wards did not in fact apply its mind to the question whether the act was for the benefit of the property or the advantage of the ward. Their Lordships further pointed that where the Court of Wards applied its mind and gave thought to the question whether the act is for the benefit of the property or the advantage of the ward and came to an honest judgment in the matter, its decision was not liable to be questioned on the ground that it was erroneous on the merits, or that it was reached without considering some aspects

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(1) A.I.R. 1956 S.C. 446.

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which ought to have been considered unless the failure to consider them was of such a character as to amount to there being no exercise of judgment at all. In the present case it cannot be said on the facts that there was any failure on the part of the Court of Wards to apply its mind to the question or that the action of the Court of Wards was not *bona fide*. As we have already said, an attack on the compromise on the grounds mentioned immediately above could not make the compromise void *ab initio* but could at best make it voidable.

In *Sm. Savitri Devi v. Ram Ran Bijoy Prosad Singh* (1) their Lordships of the Privy Council pointed out that it was plain that under the Court of Wards Act it is the Court of Wards which is responsible for the control of the person and the estate of the minor, and under section 18 of the Bengal Court of Wards Act, which in terms is similar to section 37 of the U. P. Court of Wards Act, the Court of Wards had the power to arrange a compromise of a suit on behalf of a minor. It is clear on an examination of the provisions of the Court of Wards Act that the Court of Wards have an overriding power in the matter of the management, disposal and settlement in regard to the estate of a ward under its superintendence.

Sir Iqbal Ahmad appearing on behalf of the opposite party contended that so far as the question of entering into a compromise was concerned, representatives who were to be appointed under section 56 of the Act could have no power of compromise for they had only power to "conduct or defend the case". It was pointed out that if the intention of the Legislature was to give a power of compromise to the representatives, then provision would have been made to that effect in the same manner as provision has been made in sub-section (2) of section 59. Sub-section (2) of section 59 reads thus :

"Such manager may, subject to the control of such Collector, or, where there is no such

(1) A.I.R. 1950 P.C. 1.

manager, such Collector may institute, defend, compromise, or otherwise deal with suits, applications, or other proceedings in revenue courts relating to the property entrusted to him."

This argument of Sir *Iqbal Ahmad* appears plausible but we do not consider it necessary in the view we have taken to go further into it to see whether or not the argument was assailable on some grounds.

It was also contended on behalf of the applicant that even if the power to compromise was vested in the Court of Wards, yet a compromise entered into by the Court of Wards on behalf of the wards could only be put into court by the respective representatives. This contention does not appear to us to be sound, but even if it were so, the mere fact that a compromise was put into court by some one, who may not have had the authority to actually put it in court, would not make the compromise invalid or make the decree which was made on that compromise by the court a nullity. The compromise in this case was filed by different counsel appearing for the two wards and the compromise was properly verified in court. We have, therefore, no reason to hold that there was any such defect in the filing of the compromise or in the making of the decree on it which could make the decree a nullity.

For the reasons given above we have come to the conclusion that the decree which was made by this Court on the basis of the compromise was not a nullity and could not be ignored, and if the decree could not be ignored, then there could be no question of directing the office of the Court to continue the work of the preparation of the paper book in the appeal under Chapter XIII of the Rules of Court.

In the result we dismiss these applications and direct that the applicant pay the costs of these applications to the opposite party.

Applications dismissed.

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CRIMINAL REVISION

Before Mr. Justice James and Mr. Justice Takru

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v.

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Criminal Procedure Code, 1898, s. 540—Calling of fresh evidence after conclusion of arguments—Validity of.

The court below having called fresh evidence under s. 540, Code of Criminal Procedure, while preparing judgment in a sessions trial, the order was challenged in revision on the ground that the trial had concluded with the arguments and fresh evidence would further amount to "filling loopholes" in the prosecution case.

Held, that, "trial" within the meaning of s. 540, Criminal Procedure Code, terminates with the pronouncement of judgment or the charge to the jury in a jury trial; until the stage is reached fresh evidence can be called under s. 540 for the proper decision of the case. Further, s. 540, Criminal Procedure Code, being intended for doing justice in a case, "filling of loopholes" is a subsidiary factor and cannot be taken into account. The court in the instant case had jurisdiction to call fresh evidence and the order was rightly made.

Held, further, that s. 540, Criminal Procedure Code, is in two parts and while the first part is discretionary, the second is mandatory and the court is bound to examine fresh evidence under the second part of s. 540, Criminal Procedure Code, if it is essential to the just decision of the case.

Case-law discussed.

Criminal Revision no. 52 of 1957 from an order of B. N. Shukla, Sessions Judge, Jaunpur, dated 11th December, 1956.

P. C. Chaturvedi and K. N. Seth for the applicants.

The facts appear in the judgment.

JAMES, J. :—This revision raises two important questions with regard to the scope of section 540 of the Code of Criminal Procedure. The facts are briefly these. Ramjeet and others were tried before the Sessions Judge of Jaunpur for riot, murder and allied offences. In accordance with the recent amendment in the Code, the trial was by the Judge sitting alone. After the entire evidence had been recorded, arguments were heard and concluded on the 10th November, 1956, and the learned

Judge fixed the 21st November, 1956, for the pronouncement of judgment. But when he set down to prepare the judgment and gave thorough consideration to the evidence on the record it appeared to him that for the just decision of the case the evidence of certain persons who had not been examined hitherto was essential. Hence on the 21st November—the date originally fixed for the delivery of judgment—he decided to summon and examine those persons under section 540, Criminal Procedure Code. The defence counsel objected that this could not be done under that provision of the Code, whereas the Public Prosecutor argued the reverse, and both learned counsel cited decisions in support of their respective view points. The learned Judge after considering the rival arguments held that section 540 gave him jurisdiction to act in the manner that he had done, and accordingly he re-affirmed his order for the examination of the witnesses concerned. Aggrieved by that order, the accused persons came to this Court in revision, and before the learned single Judge the contentions advanced before the Sessions Judge were repeated. Finding that there was a conflict of judicial authority on the controversial point the learned Judge referred the case to a Division Bench. It is now before us for decision.

Two points have been raised on behalf of the accused-applicants: first, that the examination of fresh evidence was tantamount to making good lacunae in the prosecution case, hence was not justified under the provisions of section 540, Criminal Procedure Code; second, that the trial terminated with the conclusion of the arguments, hence under that section the court had no power to call fresh evidence.

The contention that section 540 of the Code cannot be used for filling loopholes left by the parties is not infrequently found contained in judgments of subordinate courts and in submissions made from the Bar, but is nonetheless a misconceived one. Section 540 is in these words:

“Any court may, at any stage of any inquiry, trial or other proceeding under this Code,

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summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined : and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

The section is manifestly in two parts, and what I should like to emphasize is that whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely *discretionary* authority to the criminal court and enables it at any stage of an enquiry, trial or other proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in court, or (c) to recall and re-examine any person whose evidence has already been recorded : on the other hand, the second part is *mandatory*, and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. The discretion given by the first part is very wide and its very width requires a corresponding caution on the part of the Court. But the second part does not allow for any discretion ; it binds the court to examine fresh evidence, and the only condition prescribed is that this evidence must be essential to the just decision of the case. Whether the new evidence is essential or not must, of course, depend on the facts of each case and has to be determined by the presiding Judge.

The misconception instinct in the applicants' argument is made evident by this analysis of the terms of section 540 and springs from a disregard of the second part of the section. This part, as should be plain, casts on the court the duty of calling fresh evidence whenever such evidence "appears to it essential to the just decision of the case". That is to say, the paramount consideration should be the doing of justice in the case, and whenever the court finds that any evidence which is essential for this has not been examined, the law enjoins it to call and examine it. If this results in what is sometimes

thought to be the "filling of loopholes", that is a purely subsidiary factor and cannot be taken into account.

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Experience shows that subordinate courts in exercising their powers under section 540, Criminal Procedure Code, confine themselves to its first part, viz., the discretionary part, but seem almost unaware of its second part, viz., the mandatory part, so that while dealing with their judgments this Court often comes across some such criticism as "so and so was a necessary witness for the prosecution (or defence, as the case may be) but has not been produced", and the court concerned then proceeds to draw inferences adverse to the party concerned. No doubt, illustration (g) to section 114 of the Evidence Act entitles the court to presume that evidence which could be and is not produced would, if produced, be unfavourable to the person withholding it. Nevertheless, section 114 notwithstanding, for the benefit of subordinate courts I should like to stress that in the trial of criminal cases it should not be necessary for them to rely on mere presumptions when the second part of section 540 of the Code obliges them to summon the witness in question, and at least criminal courts, (unlike civil courts, for the analogous provision of Order XVI, rule 14 of the Code of Civil Procedure gives the civil court merely discretionary authority), are not entitled to level the type of criticism just referred to.

Reverting to the instant case, the Sessions Judge on a thorough consideration of the evidence before him came to the conclusion that the statements of certain witnesses who had not been examined by either party was essential to the just decision of the case and accordingly ordered them to be summoned and examined. His order was fully in accordance with the second part of section 540, Criminal Procedure Code, and cannot be legitimately objected to. It has been objected that he decided to summon the witnesses at the suggestion of the Public Prosecutor. I do not consider that the objection is valid, and I am firmly of opinion that the learned Judge was entitled to call the fresh evidence irrespective of the source which inspired him to do so.

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I turn to the second and more controversial point raised in the revision. The accused applicants contend that the trial terminated with the conclusion of the arguments hence the Sessions Judge had no power to utilize the provisions of section 540 of the Code, whereas the learned State counsel argues that the trial extended to the delivery of judgment, hence fresh evidence could be examined any time before that. The issue depends on what exactly the term "trial" means in section 540. On this matter there has been some conflict in judicial opinion, but to my mind the conflict can be easily resolved if we bear in mind the fundamental principle of interpretation of statutes with regard to specific words or expressions used by them. If any word or expression is found defined in the statute it must be given that meaning wherever it occurs in that statute, and in this matter there can be no compromise. But in *S. V. Parulekar v. The District Magistrate of Thana* (1) their Lordships of the Supreme Court affirmed the views of Craies and Maxwell that although it is reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act, the presumption is not of much weight, and that if sufficient reason can be assigned, the same word or phrase may be used in different senses in the same statute, and even in the same section.

Now, the Code of Criminal Procedure of 1872 defined a "trial" as meaning "the proceedings taken in court after a charge has been drawn up, and includes the punishment of the offender". But the definition was excluded from the Codes of 1882, 1898 and 1923, nor was any included in the amendment of 1955, so that from the present Code the definition of the word "trial" is missing. Nor is the word found defined in the General Clauses Act. From the fact that in 1872 the Legislature defined the term "trial" but omitted the definition from subsequent amendments, we can legitimately presume that they in their wisdom did not intend to assign a constant meaning to "trial", in the various provisions of the present Code.

(1) A. I. R. 1957 S.C. 23.

This is precisely what judicial opinion holds. A Division Bench of the Calcutta High Court in *Jiban Molla v. Emperor* (1) held that the word "trial" has no fixed or universal meaning and must be construed with regard to the particular context in which it is used and with regard to the scheme and purpose of the measure concerned. This was approved by the Federal Court in *Piare Dusadh v. Emperor* (2). The decisions of the Madras High Court in *Venkatachennaya v. Emperor* (3) and of this Court in *Inayat v. Rex* (4) subscribe to the same view. It is, therefore, evident that "trial" in the Code was not intended by the Legislature to have a constant meaning and that the meaning has to be determined in the context and intendment of each individual section in which the term is found used.

I turn now to address myself to the question in controversy before this Bench: does a trial under the Code terminate with the arguments or does it extend to the delivery of judgment? The answer would depend on the purpose and intention of section 540. Now, this section authorizes the court to take fresh evidence if it considers it to be necessary for the just decision of the case it is trying. An illustration will show how the object of this section would be defeated were the trial thought to stop with the arguments. After hearing arguments the Magistrate or Judge sits down to prepare his judgment, and for this studies the police case diary; he finds that it contains some essential evidence which the prosecution have withheld the defence have naturally no means of knowing what the diary contains. Shall we then hold that the Magistrate or Judge is debarred from calling that essential evidence? If he is so debarred, a just decision of the case would manifestly not be possible. But keeping in mind the object of section 540, we must hold that he is not debarred. It follows that he can take evidence under section 540 up to the time of delivery of judgment.

This is what has been held in two Division Bench cases of this Court, *Chunnu Lal v. Rex* (5) and *Inayat*

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(1) A.I.R. 1933 Cal. 551.

(2) A.I.R. 1944 F.C. 1.

(3) A.I.R. 1920 Mad. 337.

(4) A.I.R. 1950 All. 369.

(5) A.I.R. 1949 All. 692.

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 RAM JEET v. *Rex* (1), both arising out of evidence recorded under
 section 540 subsequent to the conclusion of arguments.
 v. In the former case the Bench held :
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"The Code does not lay down the point of time when a trial is to be deemed to be concluded. To our mind a trial continues till the judgment is delivered. Even though at one stage the evidence of the parties is concluded and arguments have been heard, the court before delivering judgment is entitled in the interest of justice to examine of its own motion any witness, provided, of course, the interests of the accused are not prejudiced thereby. Section 540 in our opinion empowers a court to take such evidence."

It is worth noting that in the latter case, that of *Inayat v. Rex* (1) not only was the order for summoning fresh evidence made after the conclusion of arguments but subsequent to the taking of the opinion of the assessors. The Bench held that the word "trial" had not been used throughout the Code in the same sense, and they fortified this conclusion by a reference to the history of the law relating to criminal procedure and pointed to the omission of a definition of the term in Codes subsequent to that of 1872. Approving the decision in *Chunnu Lal v. Rex* (2), it observed as follows :

"The object of section 540, Cr. P. C., is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence in the case, which is necessary for a just and proper disposal of the case . . ." The court examines this evidence neither to help the prosecution, nor to help the accused. The evidence is examined in the interest of justice. There seems to be no reason why it should have been intended

(1) A.I.R. 1950 All. 369.

(2) A.I.R. 1949 All. 607

by the legislature that the court should be robbed of this power or should be absolved of its duty of ascertaining the truth before a case has been decided but after the parties have concluded the evidence or argued the case. If the provisions were intended for the benefit of the parties, it may have been possible to argue that a party, having exhausted all the opportunities allowed to it, should not be permitted to introduce further evidence. The provision has not been, as already stated, inserted for the benefit of a party. It is often that after the parties have led all the evidence and the court has given a thorough consideration to that evidence, the court feels the necessity of examining some evidence which has not been brought before it.

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The Code does not specify when a trial ends, and even if we accept the arguments of the learned counsel for the applicants that a judgment is no part of a trial, there is nothing to hold that a trial comes to an end before a judgment has been pronounced. In our opinion a trial is terminated by the pronouncement of a judgment, and so long as a judgment has not been pronounced a trial is not terminated, even though the judgment itself may not be a part of the trial."

With great respect, I am wholly in agreement with these observations.

A similar view has been held by the Calcutta High Court in *Ananda v. Basu* (1) and *Mofizuddin v. Sekandar* (2), by the Madras High Court in *In re. P. C. Parumal* (3), by the Patna High Court in *Ram Chandra Prasad v. Emperor* (4), by the Nagpur High Court in *Mohammad*

(1) (1897) I.L.R. 24 Cal. 167.
 (3) A.J.R. 1924 Mad. 587.

(2) A.I.R. 1934 Cal. 133.
 (4) A.I.R. 1937 Pat. 246.

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Akbar v. Emperor (1), by the Lahore High Court in *Mangat Rai v. K. E.* (2) and by the erstwhile Oudh Chief Court in *Gur Baksh Tewari v. Emperor* (3), all cases dealing with the recording of fresh evidence under section 540 subsequent to the conclusion of arguments.

I would also refer to the opinion of the learned authors of the A. I. R. commentary on the Code of Criminal Procedure, Vol. IV, 5th Ed., appended under section 540 :

“The powers conferred by this section can be exercised at any stage of the enquiry or trial. An enquiry or trial comes to an end when the judgment or order is pronounced and until then the court has power to act under this section. Thus, a fresh witness can be summoned and examined even where the evidence on both sides is closed and the case is posted for judgment.”

Judicial opinion thus overwhelmingly favours the view that a “trial” extends up to the time of delivery of judgment and that fresh evidence under section 540, Criminal Procedure Code, can be taken at any time up to that stage.

There are two Division Bench cases of this Court, *Bakshi Ram v. Emperor* (4) and *State v. Jai Singh* (5), which express a contrary opinion and which have been strongly relied on by the applicants. In the former case it was held that “the trial of a case includes those stages of the proceedings of the case in which the parties thereto are entitled to take part. The trial, therefore, extends to the recording of evidence and to the hearing of arguments”. It is necessary to recall the facts which gave rise to, that decision. The decision of the question referred to the Bench depended on the interpretation of the word “trial” occurring in section 408, Criminal

(1) I.L.R. [1948] Nag. 308.

(2) A.I.R. 1928 Lah. 647.

(3) A.I.R. 1918 Oudh. 142.

(4) A.I.R. 1938 All. 102.

(5) Criminal appeal no. 871 of 1951, decided on 5th March, 1953.

Procedure Code. The presiding officer had been an Assistant Sessions Judge till the conclusion of arguments, but had been made an Additional Sessions Judge when he delivered the judgment, and since the sentences were below the limit of four years' imprisonment, the question was whether the appeal lay to the Sessions Judge or to the High Court. The Bench relying on sections 366 and 497 (4) of the Code and certain rulings held that the judgment is no part of the trial and is outside the scope of a trial as contemplated by the Code of 1898. The Bench did not address itself to the question whether or not the word "trial" in the Code has a constant or variable meaning, nor did it examine the sense in which it is used in section 540. In my opinion its decision is only an authority for deciding the question of the forum of appeal under section 408, and, with great respect, I am unable to utilize it for purposes of section 540.

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The case of *State v. Jai Singh* (1) is more to the point, for in it the question was whether under section 540 the Sessions Judge could take the evidence of any witness after he had recorded the opinions of the assessors and discharged them, and before he had pronounced judgment. The Bench considered the decisions in both *Bakshi Ram v. Emperor* (2) and *Inayat v. Rex* (3) and holding that they were not inclined to agree with the view expressed in the latter that the trial terminates with the delivery of judgment, preferred the view expressed in *Bakshi Ram's* case (2). In conclusion it observed as follows :

"In view of the various provisions of the Code of Criminal Procedure, specially those relating to the trial of Sessions cases with the aid of assessors of Jury, it appears to us that for the purposes of section 540, Cr. P. C., the stage of trial comes to an end after the evidence has been recorded, arguments heard and the opinion of the assessors or the verdict of the Jury has

(1) Criminal appeal no. 871 of 1951, decided on 5th March, 1953.
(2) A.I.R. 1938 All. 102. (3) A.I.R. 1950 All. 369.

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been taken. There is no provisions in the Code of Criminal Procedure which empowers the Sessions Judge to revive the trial after re-summoning the assessors or the Jury. . . the ultimate limit of a trial is when there is no more participation of the assessors or the Jury in the trial of the case, and this stage comes when the opinion of the assessors or the verdict of the Jury has been recorded."

No exception can be taken to this view so far as a Jury trial is concerned, for in such a trial the charge to the Jury takes the place of the judgment, and as soon as the verdict of the Jury has been given nothing remains to be done except acquitting the accused or passing sentence on him, (unless, of course, the Judge decides to submit the case to the High Court under section 307, Cr. P. C.). But with profound respect, I am unable to agree with the Bench so far as a trial with the aid of assessors is concerned, for there was no provision in the Code for discharging the assessors after recording their opinion, so that no question of reviving the trial after their discharge can possibly arise. Besides, the question of a trial with the aid of assessors has now become a matter of mere academic importance for such trials have been abolished by the recent amendment to the Code.

I might add that there is a decision of a Division Bench of the Lahore High Court, *Santa Singh v. K. E.* (1), which expressed the same opinion as *State v. Jai Singh* (2), namely, that the trial ends with the recording of the opinion of the assessors, hence evidence under section 540 cannot be taken after their opinion has been recorded. But no reasons are found given for this view, which purports to follow two earlier cases of the late Chief Court of Punjab, *Santa Singh v. K. E.* (1), is, therefore, of no assistance to me. Besides, in the later case of *Mangat Rai v. K. E.* (3), which has been referred to earlier, the Lahore High Court held a contrary view.

(1) 35 CrL.L.J. 100 2.

(3) A.I.R. 1928 Lap. 647.

(2) Criminal appeal no. 871 of 1951, decided on 5th March, 1953.

Two other cases, *Alex Pimento v. K. E.* (1) and *Natabar Ghose v. Adya Nath* (2), relied on by the applicants are really of no help to them : the first did not relate to section 540, while the second case was based on the particular facts of the case.

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In view of the foregoing discussion, the conclusion I arrive at is that for purposes of section 540 of the Code, a trial terminates with the pronouncement of the judgment or the charge to the Jury and so long as the judgment has not been pronounced or the Jury charged, the trial is not terminated. Consequently, a Magistrate or a Judge sitting alone, is entitled to call fresh evidence up to the stage of delivering judgment. Similarly, a Judge sitting with a Jury can take fresh evidence until the stage of his charge to the Jury.

Both the points raised on behalf of the applicants are thus bound to fail. I would, therefore, uphold the impugned order of the Sessions Judge of Jaunpur, dismiss this revision and remit the record to the learned Judge for proceeding with the trial of Ramjeet and his co-accused according to law.

Takru, J. :—I agree and have nothing to add.

By the Court—We find no substance in the two points raised on behalf of the accused applicants. Accordingly, we affirm the impugned order of the Sessions Judge of Jaunpur, dismiss this revision and direct that the record be remitted to the learned Judge for proceeding with the trial of the applicants according to law. Since the matter has been pending for some considerable time, the learned Judge should make every effort to complete the trial early.

Revision dismissed.

(1) A.I.R. 1920 Bom. 339.

(2) A.I.R. 1923 Cal. 690.

APPELLATE CIVIL

*Before the Honourable O. H. Mootham,
Chief Justice, and Mr. Justice Sirvastava*

SHIV NARAIN (APPELLANT)

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V.

THE DEPUTY DIRECTOR CONSOLIDATION,
MATHURA AND OTHERS (RESPONDENTS)

United Provinces Consolidation of Holdings Act . . . , s. 12 and Civil Procedure Code, 1908, Or. III, r. 4—Application signed and presented by a person other than the objector—Defect whether curable.

Dispute having arisen in connexion with consolidation proceedings an objection was filed under s. 12, U. P. Consolidation of Holdings Act, on behalf of two persons, it having been signed and presented by a person other than the objectors, the contention was that the objection under s. 12 was void.

Held, that, the absence of the signature of the objectors on the application as also its defective presentation did not render the application void. It constituted a mere irregularity which was curable. The Deputy Director of Consolidation rightly directed the defects to be removed.

Case-law discussed.

Special Appeal no. 286 of 1957 from a decision of Chaturvedi, J., dated 4th October, 1957, in Civil Misc. Writ no. 1624 of 1957.

The facts appear in the judgment.

S. B. L. Gour for the appellants.

The judgment of the Court was delivered by—

SRIVASTAVA, J.:—This appeal has been preferred against an order of Mr. Justice CHATURVEDI by which he dismissed a petition filed by the appellant under Article 226 of the Constitution.

One Govind Ram had several holdings in village Nagla Parsu, mazra mauza Gutehra, pargana Saidabad, district Mathura. He owned some of these holding exclusively. In others he only owned a share. On his death the appellant claimed to be entitled to the holdings on the ground that he had been adopted by Govind Ram. The respondents nos. 2 and 3 contested the appellant's claim, denied his adoption and claimed to be the heirs

of Govind Ram under the Hindu Law. The appellant, however, succeeded in having mutation ordered in his own favour. Consolidation proceedings then started in the village and in accordance with section 11 of the Consolidation of Holdings Act, a statement of the plots of tenure-holders was prepared and published. In that statement the appellant was shown as tenure-holder of the plots which formerly belonged to Govind Ram. An objection purporting to be one under section 12 of the Consolidation of Holdings Act was then sent by post to the Assistant Consolidation Officer. It purported to be on behalf of respondents nos. 2 and 3, but is alleged to have been signed by one Radha Kishan only. The Assistant Consolidation Officer rejected the objection on the ground that it had not been properly presented and had not been made by an authorized person. The respondents nos. 2 and 3 then went up in appeal to the Settlement Officer, who agreed with the view of the Assistant Consolidation Officer and dismissed the appeal. They then went up in revision to the Deputy Director of Consolidation, who allowed the application in revision on the 20th April, 1957, set aside the order dismissing the objection and remanded the case for disposal on merits, after giving an opportunity to the respondents nos. 2 and 3 to remove the defect that had been pointed out in respect of the objection. In the meantime a statement of principles had been prepared and published under section 16 of the Consolidation of Holdings Act on the basis that no objection had been filed on behalf of the respondents. A statement of proposals under section 19 of the Act was also prepared and published. The respondents nos. 2 and 3 then filed an application under section 20 of the Act, raising a question of title in respect of the holdings of Govind Ram and made a prayer to the Consolidation Officer that the question of title raised by them be referred to arbitration. This prayer was opposed on behalf of the appellant on the ground that no objection under section 12 having been filed, it was not open to the respondents to raise a question of title and to have it referred to arbitration. The Consolidation Officer allowed the application of the respondent in

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respect of the *khata* of which Govind Ram was the sole owner and referred the question of title raised in respect of that *khata* to arbitration. He, however, rejected their prayer in respect of the *khata*s in which Govind Ram owned only a share and refused to make a reference in respect of those *khata*s. The respondents filed an appeal before the Settlement Officer against the order refusing to make a reference, while the appellant preferred and appeal against the order making the reference. The respondent's appeal was dismissed by the Settlement Officer while the appellant's appeal was allowed. The respondents then filed two applications in revision before the Deputy Director of Consolidation against the two orders of the Settlement Officer. These two applications were allowed by the Deputy Director of Consolidation by his orders, dated the 29th May, and the 30th May, 1957. He took the view that the respondents were entitled to have the question of title referred to arbitration in respect of all the *khata*s in dispute. He was of the opinion that the appellant's objection that no question of title could be raised as no objection had been filed under section 12 of the Act was not tenable because he had already held that objection under section 12 had been filed and had directed by his previous order, dated the 20th April, 1957, that the objection be heard on merits. The appellant then filed the writ petition against the dismissal of which the present appeal has been filed and prayed that the orders of the Deputy Director of Consolidation, dated the 20th April, 1957, and the 30th May, 1957, be quashed by a writ of *certiorari*. The main ground pressed in support of the application was that the Deputy Director of Consolidation committed a manifest error of law when he entertained the objection filed under section 12 even though it had not been signed or presented by an authorized person. The other ground urged was that if in the eye of the law the objection filed under section 12 was not a valid objection at all, it was not open to the respondents to request under section 20 of the Act that a question of title be referred to arbitration. The Deputy Director of Consolidation, therefore, it was urged, acted without jurisdiction when

he directed that the question be referred to arbitration as prayed by the respondents. Both these contentions were rejected by the learned single Judge and he dismissed the appellant's petition.

In appeal also the learned counsel for the appellant reiterated the contention that as the objection filed under section 12 had not been presented by the respondents nos 2 and 3 themselves or by a person duly authorized by them, it could not be considered to be an objection at all. He urged also that the so-called objection had not even been signed by the respondents nos. 2 and 3 and they had not shown that Radha Kishan who had signed it held any authority on their behalf to do so. On that ground too the objection had no effect. It is, therefore, contended that the Deputy Director of Consolidation was wrong in ordering that the objection be entertained and be decided on merits.

From the copy of the order of the Deputy Director of Consolidation, dated the 20th April, 1957, it does not appear whether the point that the objection filed under section 12 was not signed by the respondents nos. 2 and 3 or any person duly authorized on their behalf was taken before that officer. He allowed the application in revision and remanded the case for decision on merits because he felt that the present respondents had never been apprised of the defect pointed out in connexion with their objection and had never been given an opportunity to remove it. He also held that if an objection was really filed under section 12, there was nothing to prevent the respondents from raising a question of title under section 20 and having it referred to arbitration.

The learned counsel for the appellant has failed to satisfy us that this view of the Deputy Director of Consolidation was vitiated by any manifest error of law or defect of jurisdiction. So far as the question of improper presentation is concerned, it appears to be well settled that the physical act of presentation is not of much importance and defective presentation of an application or plaint is at the most an irregularity which

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is easily curable. Thus in connexion with the presentation of a plaint by an unauthorized person a Special Bench of this Court laid down in *Wali Mohammad Khan v. Ishak Ali Khan* (1) :

"Omission to comply with the provisions regarding presentation of plaint is a mere irregularity and not an absence of jurisdiction; and if a person presenting it is not properly authorized the presentation would be irregular and the court would then have the discretion to allow the irregularity to be cured or not."

Later in *Kanhaiya Lal v. The Panchaiti Akhara* (2) a Full Bench had to answer the question, whether an application for execution, which had been presented by a pleader who had no authority to do so, was not to be considered to have been made in accordance with law for the purpose of saving limitation. After an elaborate discussion of the matter the question was answered in the negative. The view taken was that the physical act of presentation could be performed by any person to whom the person making the application entrusted it and that even if it be assumed that the presentation by such a person was not strictly in accordance with law, the defective presentation constituted a mere irregularity, which did not make the application in execution one not made in accordance with law. Very recently in the case of *Satyanarayana v. Venkata* (3), the same question arose before the Andhra High Court. It was urged in that case that the presentation of an application by a pleader to whom the authority in the prescribed manner under rule 4, Order III of the Code of Civil Procedure was not given was a nullity and not only an irregularity which could be cured at a subsequent stage. The Full Bench which considered the question laid down that the presentation was not a nullity but merely an irregularity which could be cured. In view of these authorities the Deputy Director of Consolidation cannot be held to have gone wrong

(1) A.I.R. 1931 All., 507.

(2) I.L.R. [1949] All. 973.

(3) A.I.R. 1957 And. 172.

when he refused to attach undue importance to the point raised by the appellant that the objection filed by the respondents under section 12 was vitiated because of irregular presentation. The irregularity could in any case be cured and it was for that purpose that the Deputy Director of Consolidation sent the case back to the court below.

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The alleged absence of the respondents' signature on the objection filed under section 12 could also not render it absolutely void. In the case of *Basdeo v. John Smidt* (1), the plaint in a suit had not been signed by the plaintiff named therein or by any person duly authorized on his behalf. It was argued that that defect was fatal and made the plaint void, but the contention was not accepted and it was held that the defect could be cured by amendment at any stage of the suit, if the suit was in fact filed with the knowledge and by the authority of the plaintiff. The same view was taken in *B. B. and C. I. Rly. Co., Ltd. v. Siyaji Mills Co., Ltd.* (2). In that case the plaint had been instituted by an agent with the knowledge and by the authority of the plaintiff, but had not been properly signed or filed. It was held that the irregularity was not fatal and could not affect the jurisdiction of the court.

The defects pointed out in connexion with the objection filed under section 12 were thus curable and not fatal. If the Deputy Director of Consolidation found that the respondents had never been informed about the defect and had not been given any opportunity of removing them, he could in our opinion afford that opportunity to them and allow the objection to be entertained and decided on merits.

It is not disputed that when both the appellants and respondents were claiming to be tenure-holders of the holdings of Govind Ram, a question of title was involved and could be raised under section 20 of the Consolidation of Holdings Act. The only contention raised by the appellant was that as the respondents had failed to file an objection under section 12, (their objection being

(1) (1900) I.L.R. 22 All. 55. (2) A.I.R. 1957 All. 514.

1958 admitted and the record was called, section 25 of the
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“The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit.”

By the Provincial Small Cause Court (U. P. Amendment) Act, (U. P. Act no. XVII of 1957), the following has been substituted for the section with effect from the 4th of June, 1957, when the Amending Act was published in the *State Gazette* :

“*Revision of decrees and orders of Court of Small Causes—25.* The District Judge, for the purpose of satisfying himself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as he thinks fit.”

The contention appears to be that on and after the 4th of June, 1957, in view of the new section 25, the power of revision decrees and orders of Courts of Small Causes has been taken away from the High Court and conferred on the District Judge. The effect of this change in the law is not only that after the 4th of June, 1957, the High Court cannot entertain any new application under section 25 of the Provincial Small Cause Court Act, but also that it has lost its power to dispose of applications which are pending before it on account of having already been admitted. It is urged that in view of the amended section, this Court must return all applications pending before it for presentation to the court of the District Judge. That was the order passed in *R. S. Lala Damodar Das v. Sri Raghubir Saran* (1). In the earlier case of *The New Singhal Dal Mill v. Firm Sheo Prasad Jainti Prasad* (2), the applications in revision

(1) Civil Revision no. 789 of 1950, decided on 18th November, 1957.

(2) Civil Revision no. 867 of 1957, decided on 15th November, 1957.

had been filed after the 4th of June, 1957 and the question how the applications filed before that date should be dealt with in view of the amendment of the section did not arise for decision. Certain observations were, however, made by the Division Bench which decided that case and those observations were utilized by the learned Judge who decided the later case in support of his view.

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Sri Jagdish Swarup, learned counsel for the applicant, questions the correctness of the decision in the two aforementioned cases and after hearing him at some length, I feel that the matter does deserve re-consideration.

It is emphasized by the learned counsel that the change in section 25 has been effected during the pendency of the application in this Court and unless it is clearly provided in the new section that it will be applicable to pending applications also it should not be held to apply to such applications. Reference in this connexion may be such made to what Maxwell has said in his "Interpretation of Statutes" at page 229. He says :

'When the Law is altered during the pendency of an action the rights of the parties are decided according to law as it existed when the action was begun unless the new Statute shows a clear intention to vary such Acts.'

Apparently, there is nothing in the new section to show that it is to govern all applications already filed.

The effect of section 6 of the U. P. General Clauses Act will also arise for consideration in this connexion. That section deals with the effect of a repealed legislation and provides that repeal of an Act shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Act or any remedy or legal proceeding commenced before the repealed Act shall have come into operation, in respect of any such right, privilege, obligation or liability. In the case of *The New Singhal Dal Mill and Firm Sheo Prasad Jainti Prasad* (1), it was accepted in the substitution

(1) Civil Revision no. 867 of 1957, decided on 15th November, 1957.

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of a new section 25 for the old section in the Provincial Small Cause Court Act amounted to a repeal of the old section and its re-enactment in a new form. It was further contended that such a repeal and re-enactment could not take away the right of appeal in respect of a suit already instituted. It was, however, held that an application for revision could not be put on the same footing as an appeal and as no person could claim to have a vested right to move the High Court in revision, there was no right in respect of which it could be claimed that it had been left unaffected by the repeal in view of section 6 of the General Clauses Act. The exercise of the revisional powers by this Court is certainly discretionary and no person can claim as of right that this Court should revise the decree or order which he wants to assail. The right claimed by the applicant is, however, not a right to have his application decided in his favour, but a right to approach the Court for relief if he considers it necessary. Even if this is not considered to be a right, there is no reason why it should not be considered to be a "privilege". Under the repealed section every litigant had a privilege to bring to the notice of the Court that an order or decree had been passed which should not have been passed. In that case he could request the Court to call the record and satisfy itself about the correctness or propriety of the order. It was in exercise of this privilege that the applicant in the present case had moved this Court in 1952. This Court found that the applicant had a grievance which should be investigated. It, therefore, admitted his application, called for the record and issued notice to the opposite parties. The proceedings in respect of the privilege were thus allowed to be started. The applicant can, therefore, say that as there is nothing in the amended section which takes away his privilege and debars him from continuing the proceedings he had already started in view of section 6, his application in revision remains unaffected.

Even if clauses (c) and (e) of section 6 are not held to be applicable, it appears to be possible for the applicant to contend that the filing of the present application in revision in 1958^{no. 86} is a "thing" duly done under the

old law, section 25, and was, therefore, unaffected by the new section in view of clause (b) of section 6. This aspect of the matter was not considered either in *The New Singhal Dal Mill* case (1), or in the case of *Lala Damodar Das* (2).

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The new section empowers the District Judge to call for the record of cases decided by the Small Cause Court Judge and to pass such orders in respect of them as he considers fit. This is a new power conferred on the District Judge which he did not possess before the 4th of June, 1957. It is contended and apparently with some force that the section does not empower the District Judge to deal with cases decided long before the 4th of June, 1957, particularly cases in respect of which the High Court had started exercising its revisional jurisdiction by admitting the application in revision and calling for the record. How then without there being anything clear in the new section, it can be held that the District Judge has any jurisdiction to deal with the present application. If the application is returned by this Court and presented to him he may very well say that he has no power to deal with it. In that case what is the applicant to do?

It has also to be considered whether the new section besides having the positive aspect of conferring powers on the District Judge in certain respects, has the negative aspect also of taking away the powers of the High Court in respect of applications in connexion with which it had already started exercising jurisdiction.

The question appears to be of considerable importance and the decision on it is likely to affect a large number of litigants in the State. I, therefore, think that the case should be put up before Hon'ble CHIEF JUSTICE so that he may constitute a larger Bench to consider the question.

"In what way are applications in revision filed in this Court under section 25 of the Provincial Small Cause Courts Act prior to the 4th of June, 1957, affected by the substitution of a new section 25 for that section by the U. P. Act of 1957?"

- (1) Civil Revision no. 867 of 1957, decided on 11th November, 1957.
(2) Civil Revision no. 789 of 1950, decided on 11th November, 1957.

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As some of the observations made by the Division Bench in *The New Singhal Dal Mill* case (1) may also have to be re-considered in this connexion, I respectfully suggest that the Bench which is constituted for the consideration of the question should consist of more than two Judges.

Let the record be placed before Hon'ble the CHIEF JUSTICE for orders.

J. Swarup and *H. Swarup* for the applicants.

S. N. Misra for the opposite party.

MOOTHAM, C. J.:—The question which has been referred to this Court is :

“In what way are applications in revision filed in this Court under section 25 of the Provincial Small Cause Courts Act prior to the 4th June, 1957, affected by the substitution of a new section 25 for that section by the U. P. Act XVII of 1957?”

Section 25 of the Provincial Small Cause Courts Act, prior to its amendment in 1957 by the U. P. Act XVII of that year—the Provincial Small Cause Courts (U. P. Amendment) Act, 1957,—provided that

“25. The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as he thinks fit.”

By the Amending Act which came into force on the 4th June, 1957, the jurisdiction conferred on the High Court was transferred to the District Courts, the existing section 25 being replaced by a new section which reads thus :

“25. District Judge, for the purpose of revising himself that a decree or order made in any case decided by a Court of Small Causes was according to law, may

(1) Civil Revision no. 86 of 1957, decided on 1st November, 1957.

call for the case and pass such order with respect thereto as he thinks fit."

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In *The New Singhal Dal Mill v. Firm Sheo Prasad Jainti Prasad* (1) this Court has held that as a consequence of the amendment, it had no jurisdiction to entertain any application for the revision of the decree or order of a Court of Small Causes filed after the date on which the amending Act came into force. That decision turned on the interpretation placed by the learned Judges on section 6 of the U. P. General Clauses Act, which in their opinion, contained the whole law on the subject. That section so far as relevant provides that :

"6. Where any Uttar Pradesh Act repeals any enactment hereto made or thereafter to be made, then, unless a different intention appears, the repeal shall not—

- (b) affect . . . anything duly done or suffered thereunder ; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ; or
- (e) affect any remedy, or any investigation or legal proceeding commenced before the repealing Act shall have come into operation in respect of any such right, privilege, obligation, liability. . . . as aforesaid ;"

The Court held that section 25 of the Small Cause Courts Act conferred no right or privilege on any person within the meaning of section 6 of the General Clauses Act, and that accordingly that section will not operate to save the revisional jurisdiction of this Court in the case of applications presented to it on or after the 4th June, 1957. The question of the effect of the amending Act, on the Court's jurisdiction in respect of applications in revision which had been filed but which had not been disposed of before that date arose in *Udla Damodar Das v. Raghubir Saran* (2). In this case, *ESAI, J.*, held that in view of the decision in *The New Singhal Dal Mill*

(1) Civil Revision no. 867 of 1957 decided on 11th November, 1957.

(2) Civil Revision no. 789 of 1950, decided on 11th Nov., 1957.

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case (1) the court had no jurisdiction and directed that the application be returned to the applicant for presentation to the District Judge. The correctness of that decision was doubted by SRIVASTAVA, J., in the case which has given rise to the present reference.

In this Court Sri *Jagdish Swarup* for the applicant has argued, first, that an application in revision stands on exactly the same footing as an appeal, and that both are vested rights which can be taken away only by express enactment or necessary intendment, and secondly, in the alternative, that this Court's jurisdiction is preserved so far as applications in revision filed before the amending Act came into force by section 6 of the U. P. General Clauses Act. In support of his first submission learned counsel relied on a sentence in the judgment of the Privy Council in *Nagendra Nath Dey v. Suresh Chandra Dey* (2). In delivering the judgment of their Lordships Sir DINSHAH MULLA said, at page 287:

"There is no definition of 'appeal' in the Code of Civil Procedure but their Lordships have no doubt that any application by a party to an appellate court asking it to set aside or revise a decision of a subordinate court is an appeal within the ordinary acceptation of the term."

The Board in that case had to consider the meaning and effect of Article 182 (2) of Schedule I of the Indian Limitation Act, 1908, which provides *inter alia* that the period of limitation for an application for the execution of a decree or order "where there has been an appeal" is to run from the date of the final decree or order of the appellate court. Their Lordships were, therefore, considering the effect of a final order passed in an appeal or on an application in revision upon the period of limitation for execution of a decree; they were not then considering the nature of an appeal or of an application in revision. (1) and I do not think that the case is

(1) Civil Revision, Appeal of 1957, decided on 1st November, 1957.

(2) (1931-32) no. 86, 1st 1st 283, 287.

an authority for the proposition advanced by learned counsel.

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With regard to the second argument, I am, with respect, in agreement with the view expressed in *The New Singhal Dal Mill*(1) that section 25 of the Small Cause Courts Act confers no right or privilege on any person and that neither clause (c) nor clause (e) of section 6 of the U. P. General Clauses Act is attracted. Section 25 of the former Act confers a power on the Court to send for the record and pass such orders thereon as it thinks fit, and although in a popular sense an aggrieved litigant may have a right to approach the Court with the request that it should exercise its revisional powers, that right cannot possibly, in any judgment, amount to a "right accrued" within the meaning of section 25. Everyone has in one sense the right to do a thing which the law does not forbid, but the right referred to in section 6 of the General Clauses Act must be a right which has accrued under a repealed Act. "Privilege" is defined in Wharton's Law Lexicon as "an exceptional right or advantage", and I am unable to see that section 25 of the repealed Act confers a special advantage on anyone. And if no right or privilege accrues or is acquired under a repealed Act, then it appears to me to be clear that neither clause (c) nor clause (e) (which refers to any remedy, investigation or legal proceeding commenced under the repealed Act in respect, *inter alia*, of any such right or privilege) can have any application. Nor do I think that the position is altered by the fact that the Court may have admitted an application in revision and directed the issue of notice to the opposite party; for that is an act done by the Court itself and cannot amount (in my view) to the conferment under the repealed Act of a right or privilege on the applicant.

Clause (b) of section 6 of the General Clauses Act stands on a somewhat different footing. It provides that the repeal of an Act shall not, and a different intention appears, "affect . . . to his duty done" under the repealed Act.

(1) Civil Revision no. 867, decided on 11 November, 1957.

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Now in the case of applications in revision which were filed in this Court before the 4th June, 1957, (other than those which have been finally disposed of with which we are not concerned), the Court either has as yet made no order or has called for the record and directed the issue of notice requiring the opposite party to appear before the Court and answer the application. The act of calling for the record is something done under the repealed section and so also in my opinion is the issuing of notice. No provision, it is true, is to be found in the repealed section with regard to the issue of notice but the Court obviously cannot make an order which may prejudicially affect the opposite party without doing so. The Court has called for the records of these cases for the sole purpose of enabling it to determine whether it shall exercise its revisional powers, and in my opinion there is considerable force in the argument that if the Court is now no longer able to exercise such powers in respect of these cases, a "thing duly done" namely, the calling for the records, is affected within the meaning of clause (b) of section 25, because the purpose of the action is wholly frustrated. I prefer, however, to base my judgment on another and, I think, wider ground.

Nova constitutio futuris formam imponere debet non praeteritis—a new state of the law ought to affect the future, not the past—is a well known maxim of law. the foundation of which, as pointed out in *Pinhorn v. Souster* (1), is that it cannot be supposed that the legislature meant to do injustice. The maxim is the foundation of the rule that a statute will not be presumed to have retrospective effect, but it embodies in my opinion a principle of more general application. Now, for some reason which is not easy to imagine, the Legislature in the present case has made no provision in the amending Act, (as it could very easily have done), to avoid the revisits which have arisen as to whether the High Court uses (c) continue to possess jurisdiction to hear applications in revision filed before the amending

no. 86, (1958) 8 Ex. Ch., 138, 142.

Act came into force and were pending at that time. 1958
The amount in dispute in cases which come before a OM PRAKASH
Court of Small Causes is usually small and the litigant v.
in those courts is usually poor. It seems to me to be MOTI LAL
an act of injustice to require such litigants, who have at
a time when it was the settled practice to do so filed
applications in revision in this Court, engaged counsel
and paid the process fees for the issue of notice, to com-
mence proceedings over again in another court; and
unless I am compelled to do so, I cannot think that such
was the intention of the Legislature. In the case of all
such applications as were pending on the date on which
the amending Act came into force, it was, (save in the
case of applications filed shortly before that date), the
delay of the Court, and no fault of the litigant, that
deprived the latter of judgment before the amending
Act became law. I do not think that the Legislature
intended the amending Act to involve unnecessary hard-
ship and I am not satisfied that I am obliged to hold the
contrary. I would answer the question propounded by
saying that this Court retains jurisdiction to hear
applications in revision filed in this Court under section
25 of the Provincial Small Cause Courts Act prior to the
4th June, 1957, in all cases in which prior to that date
the Court had directed the record to be called for.

BHARGAVA, J.:—I entirely agree with my Lord the
CHIEF JUSTICE *but* I would like to add that I would
prefer to base my decision for arriving at the same con-
clusion on the provisions contained in clause (b) of sec-
tion 6 of the U. P. General Clauses Act. Section 25 of
the Provincial Small Cause Courts Act, as it stood before
the amendment, empowered the High Court to do two
acts: The High Court could call for the case and
thereafter could pass such order with respect thereto as
it thought fit. The act of calling for the record in this
case was undoubtedly something duly done by this Court
under section 25 of the Small Cause Courts Act men-
tioned above and, consequently, the amending Act which
repeals the provision empowering this Court to
call for a case and pass orders on it does not affect the act

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of the High Court in calling for the case. If that order of the High Court is unaffected, it implies that the High Court continues to have jurisdiction to pass further orders in the case. If the jurisdiction to pass further orders in the case were to cease, the result would be that the order calling for the record would become ineffective and would have to be vacated by the Court. It appears to me that the consequence of the applicability of the provisions of section 6 (b) of the U. P. General Clauses Act, therefore, is that the High Court having validly called for the record and its order not being affected by the subsequent Act, it continues to have jurisdiction to pass further orders in pursuance of that valid Act and, consequently, to pass such order with respect to the case as it may think fit.

There are some statutes under which only rights, privileges, obligations or liabilities are acquired or accrue or are incurred but which contain no provision for any remedy or legal proceeding in respect of any right, privilege, etc. In such a case, the amendment or repeal leaves the right, privilege, obligation or liability already acquired, accrued or incurred unaffected by virtue of clause (c) of section 6 of the U. P. General Clauses Act. Then there are statutes in which there is, in addition, the provision for seeking a remedy or for starting investigation or legal proceeding in respect of the right, privilege, etc. If such a statute is amended or repealed, the right, privilege, etc. remains unaffected under clause (c) of section 6 of the U. P. General Clauses Act, whereas the remedy, investigation or legal proceeding already commenced before the repealing or amending Act comes into force, remains unaffected under clause (e) of section 6 of the U. P. General Clauses Act. Then there are statutes which deal only with the remedy, investigation or legal proceeding in respect of a right, privilege, etc. but the right, privilege, etc. is acquired, accrues or is incurred under some other statute or under common law. It would appear anomalous that, in a case where both the accrued right as well as the remedy or legal proceeding are provided in the same statute, both should remain unaffected as a result of the amending or

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repealing Act ; whereas, in a case where the right has accrued under a statute which is not amended or repealed at all but the remedy or legal proceeding is under the statute which is amended or repealed, the remedy or legal proceeding should be affected by the amending or repealing Act. It appears to me that, in such a case, clause (b) of section 6 of the U. P. General Clauses Act applies and preserves the continuity of the remedy or legal proceeding already commenced as being something duly done or suffered under the amended or repealed Act. Clause (b) of section 6 of the U. P. General Clauses Act should, therefore, be interpreted as covering anything duly done not only by parties litigating or claiming the right but also anything duly done by the court before which the remedy or legal proceeding is commenced. In the case before us, a legal proceeding had commenced in this Court when the record of the case was called for under section 25 of the Small Cause Courts Act, which Act only deals with the remedy or legal proceeding in respect of certain rights. Once the Court had taken cognizance and had commenced the proceedings, they remain unaffected as a result of clause (b) of section 6 of the U. P. General Clauses Act, even though the amending Act takes away that jurisdiction in respect of any remedy or legal proceeding commenced subsequent to its enforcement. This interpretation of clause (b) of section 6 of the U. P. General Clauses Act thus also embodies in it and gives effect to the principle that, if a litigant has moved an application in revision in this Court, engaged a counsel and paid the process fee for issue of the notice so that proceedings have commenced, he is not put to the hardship of being deprived of the judgment of this Court for no fault of his in case the decision in the revision is delayed by the Court. I consequently, agree in the answer proposed by my Lord the CHIEF JUSTICE.

CHATURVEDI, J.:—I agree with the judgment of V. BHARGAVA. Judge.

Question on this accordingly.

APPELLATE CIVIL

*Before the Honourable O. H. Mootham, Chief Justice,
and Mr. Justice Chaturvedi*

HARISH CHANDRA RAJ SINGH (APPELLANTS)

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v.

DEPUTY LAND ACQUISITION OFFICER AND
ANOTHER (RESPONDENTS)

Land Acquisition Act, 1894, s. 18 (2), proviso—Limitation—All applications, if governed—Six months period reduced to six weeks, reckoned from receipt of notice—Constitution of India 1950, Art. 226.

The proviso to s. 18 (2) of the Land Acquisition Act, 1894, applies to all applications in all cases to which clause (a) does not apply. The application must be made within six months from the date of the Collector's award, but if that notice is received from the Collector, that period is reduced to six weeks from the date of such receipt, if that period be the shorter.

Jehangir Bomanji v. C. D. Gaikwad (1) relied on.

Special Appeal no. 151 of 1956 from a decision of MEHROTRA, J., dated the 22nd February, 1955, in Civil Miscellaneous Writ No. 1056 of 1953.

The facts appear in the judgment.

A. P. Pandey for the appellant.

N. D. Pant for the respondents.

The judgment of the Court was delivered by—

MOOTHAM, C. J.:—This is an appeal from an order of a learned single Judge of this Court, dated the 22nd February, 1955, granting certain reliefs on a petition under Article 226 of the Constitution. The relevant facts are not in dispute and can be stated shortly.

Certain property belonging to the petitioner was acquired under the provisions of the Land Acquisition Act, 1894; and on the 25th March, 1951, the Collector made an award in accordance with the provisions of section 11 of the said Act. No notice of his award was given by the Collector to the petitioner under sub-section (2) of section 12, and it appears from the petitioner's case that he did not come to know of the award had been made and filed until the 13th of June, 1953. The petitioner was not

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prepared to accept the award and on the 24th February, 1953, he filed an application under section 18 of the Act before the Collector that the matter be referred to the court. This application was rejected by the Collector on the same day as being beyond time. It is not clear whether, as alleged by the appellants, the petitioner was immediately informed that his application had been rejected or whether, as stated by the petitioner, he ascertained this fact only at the end of October, 1953. On the 21st December, 1953, he filed the writ petition out of which this appeal arises. In that petition the relief sought by the petitioner was the issue of a writ of *certiorari* quashing the entire proceedings culminating in the award, or, alternatively, the issue of a writ of *mandamus* commanding the first respondent, the Deputy Land Acquisition Officer, Colonization Scheme, Moradabad, "to give an opportunity to the petitioner to substantiate his application for reference and dispose of the same in accordance with the law".

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The learned Judge allowed the petition. He was of opinion that the time within which an application under section 18 had to be made began to run from the date upon which the petitioner became aware that an award had been made. The application made by the petitioner on the 24th February, 1953, was accordingly filed within time, and he directed the second respondent, the State of Uttar Pradesh, to consider that application in accordance with law.

The appellants' contention is that whether a notice be issued by the Collector pursuant to section 12 (2) of the Act or not, the maximum period within which an application must be made under section 18 is six months from the date of the Collector's award, and that as the application in the present case was admittedly filed at a very much later date, it was properly rejected.

Now section 18 (1) of the Land Acquisition Act provides that any person interested in the award who has not accepted the award may, by a written application to the Collector, require that the matter be referred to the court for the determination of the court, and section 18 (2) enacts

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that the application shall state the grounds on which objection to the award is taken. Then there is a proviso to this sub-section, which reads thus :

“Provided that every such application shall be made—

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award ;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.”

The first question which we have to determine, therefore, is whether this proviso provides periods of limitation for all applications made under sub-section (1) or whether it applies to some only of such applications. We think the answer to this question must be that the Legislature intended the proviso to apply to all applications. The opening words of the proviso are that “every such application” shall be made, and then follow clauses (a) and (b), stating the periods within which this must be done. Clause (a) makes provision for the case of a person who was present or represented before the Collector at the time when the latter made his award, and in the case of such a person the application must be made within six weeks from the date of the award. Clause (b) is the provision which applies “in other cases” and this phrase in the context in which it is used can mean duly in our opinion, in all other cases”, that is to say, in all cases not falling within the ambit of clause (a).

It has been held by Sri A. P. Pande who appears for the petitioner, it appears, concluding words of this clause, “whichever first expire,” show that the clause only in no. 86 of 1956 on when there is a conflict between the periods of six weeks and six

months and that if no notice has been issued under section 12 (2), this clause can have no application; and in support of this submission learned counsel relies upon two sentences in the judgment of CHANDRAVAKAR, J., in *In re Land Acquisition Act* (1) where, at page 283, the learned Judge says with reference to clause (b):

"The clause in question prescribes one of two periods of limitation for a party who has not accepted the Collector's award—either six weeks from the date of the receipt of the Collector's notice, whether immediate or not, or six months from the date of the award; *whichever period shall first expire*. These last words, which I have italicized, show that the element of notice is an essential ingredient, so to say, of the two alternative periods"

We do not, with respect, think that the conclusion arrived at by the learned Judge can be drawn from the premises. What the clause means, in our opinion, is that in all cases to which clause (a) does not apply the application must be made within six months from the date of the Collector's award, but that if notice is received from the Collector, that period is reduced to six weeks from the date of such receipt, if that period be the shorter.

Sri Pande's argument means, of course, that the proviso does not cover all cases. It would not have application where (as in this case), no notice was issued at all, or, where notice was issued but was not received until after the expiry of the period of six months. The result, therefore, would be that in respect of such applications no period of limitation has been prescribed and the application can be filed at any time. We think it was the intention of the Legislature that, in the public interest, not merely the physical acquisition of land under the Act, but the determination of the case therefor should be completed without undue delay, and in our opinion section 18 (2) provides for this. Limitation

(1) (1906) I.L.R.

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for all applications, the maximum period being six months from the date of the Collector's award. This question was considered at length by the Bombay High Court in the recent case of *Jahangir Bomanji v. C. D. Gaikwad* (1), a case which appears not to have been brought to the attention of the learned Judge from whose order this appeal has been filed. The facts in that case were very similar to those in the case now before us. Fifteen months elapsed between the date of the award and the date upon which the petitioners became aware that it has been made, the only difference being that sixteen months after the award had been made, and, therefore, a month after they had acquired knowledge of it, a notice under section 12 (2) of the Act was served upon them. The Court, in a judgment delivered by the learned Chief Justice, was of opinion that an application made by the petitioners as soon as they became aware of the existence of the award was rightly rejected as being beyond time. We agree, with respect, with that decision and are in general agreement with the reason therefor stated by the learned Chief Justice.

Learned counsel for the petitioner has also contended that section 18 has in this case no application as no valid award was made by the Collector. The argument is that notice of the proposed award to every person interested in the land is a condition precedent to the making of the award, and for this proposition learned counsel relies on the provisions of section 12 and on two decisions to which we shall shortly refer. Section 12 reads as follows :

"12. *Award of Collector when to be final*—(1)

Such award shall be filed in the Collector's office and shall, except as hereinafter provided, be final and conclusive evidence as between the Collector and the persons interested, whether they have or have not appeared before the Collector for the purpose of stating the true area and value of the land and the apportionment of the compensation among the persons interested.

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- (2) The Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made."

Learned counsel contends that the words "except as hereinafter provided", appearing in sub-section (1), refer to the provisions, *inter alia*, of sub-section (2). We do not think this is so, for in our opinion it is clear that the phrase we have quoted refers to later sections in the Act providing for a reference to the court for the determination of the amount of compensation. Section 12 is concerned not with the making of the award—that is dealt with in section 11 but with its finality, and had it been the intention of the Legislature that the finality of the award should be dependent on compliance with the provisions of sub-section (2), some such words as "and subject to the provisions of sub-section (2)" would have been inserted, we think, in sub-section (1) after the phrase "except as hereinafter provided".

The first of the cases upon which Sri Pande relies is the decision of the Punjab Chief Court in *Macdonald v. The Secretary of State for India in Council* (1). In that case the Court held that it was an essential part of the making of an award that it should be communicated to the interested parties. This decision was followed in *Hari Das Pal v. The Municipal Board, Lucknow* (2). The second case relied upon a decision of the Oudh Judicial Commissioner's Court. We think, however, that these decisions are based, if we may say so with great respect, on the desire to avoid the hardship which may undoubtedly arise, if section 18 is properly interpreted. Indeed, in the earlier of these cases the Court said :

"To hold that an award is 'made' as soon as it is signed by the Collector would in many cases result in grave injustice and we, therefore, feel fully justified in holding that an award is not made until it is announced or communicated to the person interested."

(1) (1909) 4. I. C. 914

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factories were required to submit to the Cane Commissioner an estimate of the quantity of cane which would be required in the factory, and after the estimate has been examined and published and consultation had been made with an advisory committee and the occupier of the factory, the Cane Commissioner was authorized to declare any area as a reserved area for the purpose of the supply of cane to the particular factory during the crushing season.

Under section 18 (1) of the Act a cane-grower or a Cane Growers' Co-operative Society in a reserved area could offer, in the prescribed form, to supply to the occupier of the factory cane grown by the cane-grower or by the members of the Cane Growers' Co-operative Society, as the case may be, and the occupier was bound to purchase the entire cane grown in the area reserved for the factory. The cane-growers were also prohibited from supplying cane grown in that area to the occupier of any other factory. After the offer under section 18 (1) had been made, the occupier or manager of a factory for which an area had been reserved was enjoined to enter into an agreement, in such form, by such date and on such terms and conditions as may be prescribed, to purchase the cane offered.

The occupier or manager could not, however, enter into an agreement with a cane-grower directly if the cane-grower was a member of a Cane Growers' Co-operative Society. In such a case the agreement had to be with the Society. The price of the cane was to be fixed by the State Government, and the form of agreement had been prescribed in Form no. 12 of Appendix III attached to the U. P. Sugar Factories Control Rules. Among other matters, the form contained an arbitration clause, clause no. 10, which was to the effect that any dispute between the parties regarding the quality and uses (of the cane, the place of delivery, the instalment it appeared, other matters pertaining to the agreement) should be referred to arbitration in the manner provided in no. 86 of the Rules. The important rule is rule no. 23 and of this rule said that any dispute touching referred to in section 18 (2) of

the Act, shall be referred to the Cane Commissioner for decision or, if he so directs, to arbitration, and that no suit shall lie in a civil or revenue court in respect of any such dispute.

The dispute in this case was with respect to the price of the cane supplied to the first respondent, Kamlapat Motilal Sugar Mills, by the appellant, the Co-operative Marketing and Development Union, Ltd., Bara Banki, in the years 1950-51 and 1951-52 and to the commission payable to the Union thereon. With respect to the year 1950-51 there was an offer by the appellant in the prescribed form, but in the subsequent year no offer in the prescribed form was made. Only a letter was sent to the first respondent conveying to it the information that the appellant was prepared to supply a certain quantity of sugarcane. No agreement, as enjoined by section 18(2) of the Act, was drawn up for either of the two years. The first respondent, however, took delivery of the sugarcane from the appellant and paid to it part of the price. It refused to pay any commission to the appellant for the supply of sugarcane. The appellant consequently referred the matter to the Cane Commissioner under rule 23 (1) of the U. P. Sugar Factories Control Rules, 1938. The Cane Commissioner gave notice to the first respondent, but the notice was perhaps not served, and the Cane Commissioner decided the matter against the respondent. The *ex parte* order was subsequently set aside, and the respondent filed a written statement challenging its liability to pay the commission to the appellant on the ground that no agreement under section 18(2) was entered into between the parties. The Cane Commissioner gave his decision on the 4th February, 1954, decreeing the entire sum claimed as commission and a small sum of Rs.1,077-6-6 as unpaid price of cane and interest thereon at 6 per cent.

Being dissatisfied with this decision the first respondent filed a petition in this Court for the issue of a writ of *certiorari* quashing the decision of the Cane Commissioner. The price of cane decreed against the respondent had by then been paid and the

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only dispute was with respect to the commission claimed by the appellant at the rate of nine pies per maund. It was argued before the learned Judge that no agreement, as required by section 18 (2) of the Act having been entered into between the parties, the Cane Commissioner had no jurisdiction to deal with this matter under rule 23 (1) of the Rules. The learned Judge gave effect to this contention and quashed the order passed by the Cane Commissioner.

Learned Counsel appearing for the appellant has contended before us that the view taken by the learned Judge is not correct, as the facts and circumstances of the case pointed to the conclusion that there was an agreement between the parties as required by section 18 (2) of the Act, though that agreement was not put into writing. Learned counsel referred to a decision of a Bench of this Court in *Seth Banarsi Das v. The Cane Commissioner, U. P.* (1). In this case it was held by the Judge of first instance, and his finding was upheld on appeal, that an agreement in writing in Form no. 12, although not signed by the parties, was such an agreement as is envisaged in section 18 (2) of the Act, with the result that the provisions of rule 23 (1) of the rules would be attracted to it, and any dispute touching such an agreement could be referred to the Cane Commissioner for decision.

The argument of the learned counsel for the appellant is that there is no difference between an unsigned agreement and an oral agreement and, if the provisions of rule 23 (1) apply to an unsigned agreement, they apply also to an oral one. We have given due consideration to the argument of the learned counsel, but we find ourselves unable to accept it. The relevant portion of sub-section (2) of section 18 of the Act runs as follows :

"The proprietor or manager of a factory for which the cane is reserved shall enter into an agreement with the cane commission, in such form, by such date and in such manner as may be prescribed, and the terms and conditions as may be prescribed."

(1) See *supra* note 86, p. 194.

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prescribed, to purchase the cane offered in accordance with sub-section (1)."

Rule 23, sub-rule (1) may be read along with the above provision of law and it is as follows :

"Any dispute touching an agreement referred to in section 18 (2) or section 19 (2) of the Act shall be referred to the Cane Commissioner for decision, or, if he so directs, to arbitration. No suit shall lie in a civil or revenue court in respect of any such dispute."

A reading of the above provisions would show that any dispute touching an agreement, which is referred to in section 18 (2) must be referred to the Cane Commissioner, and the question is whether an oral agreement can be said to be one which is referred to in section 18 (2). [We are not concerned here with the agreement referred to in section 19 (2).] Section 18 (2) specifically mentions an agreement in such form and on such terms and conditions as may be prescribed. The form containing most of the terms and conditions is the one given in Appendix III as no. 12. It is clear, we think, that that agreement has to be in writing in order to be in that form. If the agreement is not in writing, it cannot be said to be an agreement "referred to in section 18 (2)" within the meaning of the expression as used in rule 23 (1). We think there is an essential difference between the two cases, and the agreement referred to in section 18 (2) is a written agreement and not an oral one. In *Seth Banarsi Das's* case (1), mentioned above, the Court said :

"In order that the Cane Commissioner may have jurisdiction to decide the dispute it must first be found that there was an agreement such as is referred to under section 18 (2) of the Act. The existence of the agreement is the *sine qua non* of the jurisdiction of the Cane Commissioner."

We think that there must be an agreement in writing before the provisions of sub-rule (1) can be attracted to it, and if there is no agreement in writing, the provisions of sub-rule (1) cannot be attracted to it.

(1) Special Appeal No. 158 of 1954, decided on 11th June 1956.

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writing, the Cane Commissioner will have no jurisdiction to decide the dispute between the sugar factory and the Co-operative Marketing and Development Union, Ltd. In the instant case it is admitted that no such agreement came into existence with respect to either of the two years in question, and the decision of the Cane Commissioner, therefore, must be held to be one without jurisdiction.

We have discussed this question of law on the assumption that there was in fact an oral agreement in existence between the parties with respect to both the years, 1950-51 and 1951-52. No such oral agreement was, however, set up before the Cane Commissioner, and the only facts which have been proved are that an offer for the supply of cane was made by the appellant and the respondent took delivery of the cane and paid the price of it. The above facts might raise a presumption that there was an agreement for the sale and purchase of sugarcane between the parties, but there can be no presumption that there was also an agreement to refer any dispute between them, arising out of purchase and supply of cane, to the Cane Commissioner for decision. On this point there is no evidence at all.

We agree with the decision of the learned Judge and dismiss this appeal with costs, which we assess at Rs.200.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Agarwala and Mr. Justice Beg

RADHA MOHAN (APPELLANT)

v.

MOHAMMAD SALIM (RESPONDENT)

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Civil Procedure Code, 1908, O. XXI, r. 31—Execution of decree—Decree-holder's agent for possession of goods entrusted for sale—Sale (or) recovered or price even at higher rate as on date of appointment.
In this case, the decree-holder's agent for possession of certain goods from an agent who had possession of the goods for sale the decree-holder is

entitled to recover from the judgment-debtor unlawfully withholding the same value of the goods as on the date of the final decree, even at the higher value to which the prices may have risen, if the judgment-debtor chooses to keep the goods. This course is sanctioned by O. XXI, r. 31, C. P. C., where damages are awarded as a part of the larger relief of accounting.

Case-law discussed.

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Special Appeal No. 1 of 1954 from a decision of KIDWAI, J., dated the 2nd December, 1953, in Execution Second Appeal No. 64 of 1950.

The facts appear in the judgment.

Baleshwari Prasad for the appellant.

Hari Swarup for the respondent.

The judgment of the Court was delivered by—

BEG, J.:—This is a special appeal arising out of execution proceedings relating to a suit for rendition of accounts. The suit was filed by the respondent decree-holder against the appellant judgment-debtor. The respondent decree-holder carries on business of making glass bangles. On the 26th November, 1941, an agreement was entered into between the respondent and the appellant whereby the appellant was appointed as the agent of the respondent for the purpose of selling bangles. The terms of this agreement would indicate that the respondent who was a bangle-maker had undertaken to supply *toras* (bunches) of the glass bangles to the appellant for the purpose of selling them on commission. The arrangement was that the plaintiff would send the goods to the defendant at his own expense, that the defendant would pay 75 per cent of their value on receipt, that the ownership of the goods sent would remain in the plaintiff, that after the sale the defendant would be entitled to commission on goods already sold by him as the agent of the plaintiff, and that the unsold stock of glass bangles remaining in the hands of the defendant would be returned to the plaintiff. According to this agreement if the plaintiff sent goods direct to other purchasers, he was liable, on the commission in respect of the said sales to the value of the goods sent.

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agreed that the parties would have monthly accounts between themselves. The period of contract was stipulated to be three years. It, however, appears that before the expiry of the said period, there was a rupture between the parties as a result of which the contract was terminated on the 30th April, 1942. Thereafter, on the 29th September, 1942, the plaintiff filed the suit for rendition of accounts which gave rise to the present proceedings. In this plaint the plaintiff referred to the terms of the agreement mentioned above, and claimed rendition of accounts from the defendant.

The defendant did not deny that he was the agent of the plaintiff for the purpose of the sale of bangles. He further admitted, that there were 1,373 *toras* remaining in his possession. He, however, set up a counter-claim against the plaintiff on the ground that the plaintiff had made some direct sales of the bangles, and the commission in respect of those sales as well as the commission of certain sales made by the defendant was due from the plaintiff.

On the 27th August, 1943, the trial court gave its judgment in the case ordering the defendant to submit accounts from the 1st April to the 9th May, 1942. The plaintiff was also ordered to submit accounts in respect of the direct sales made by him from the 22nd February to the 9th May, 1942. A preliminary decree in the above terms was prepared, and a commissioner was appointed by the trial court to go into the accounts.

On the 23rd November, 1942, the defendant made an application that the value of the bangles was going down, and so they should be sold off by the court. The court ordered the sale. When, however, the Amin went to sell them, it was found that the bangles which the defendant presented out were not the bangles supplied by the plaintiff for the sale, therefore, could not be held. On the 15th November, 1943, the Commissioner went into the accounts, the result of which he found that altogether 1,373 *toras* were supplied to the defendant, that out of these 1,373 *toras* were sold by the defendant and that 1,373 bangles of the design mentioned in

- Ex. CD-15 still remained in the hands of the defendant.
 • He also found that the plaintiff was liable to pay Rs.3,451-7-9 to the defendant.

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On the 18th of January, 1944, the court affirmed the Commissioner's report, and passed a final decree on the basis of the said report. On the 12th September, 1944, the plaintiff gave a notice to the defendant to return the bangles which were in his possession. The defendant did not say anything in reply. It must, therefore, be taken that the defendant did not deny the fact that he was in possession of the bangles up to that date. The plaintiff having failed to obtain recovery of the bangles from the defendant proceeded to file an application for the execution of the decree on the 20th February, 1945, for the purpose of obtaining recovery of the same. On the 29th March, 1945, the judgment-debtor objected to this application on the ground that he had already sold the bangles in question long before the suit. It might be mentioned that this objection of the defendant was obviously wrong, as he had already admitted in his own written statement that he had 1,375 *toras* of bangles in his possession, and, further, the Commissioner had found that he had 4,695 *toras* of bangles in his possession. The defendant thus having refused to hand over the bangles to the plaintiff on the 29th March, 1945, the plaintiff filed an application under Order XXI, rule 31, Civil Procedure Code, on the 24th April, 1945. At this stage the question of the valuation of the bangles, which were said to be in possession of the defendant, and to have been withheld by him, was raised in the execution court. It may be mentioned that the parties filed a schedule of rates indicating the value of the bangles in dispute at the various dates. This schedule gave an agreed rate on the relevant dates. According to this schedule the value of the bangles on the 18th January, 1944, was $3\frac{1}{2}$ times more than in 1942 and on the 29th March, 1945, i.e. on the date of ~~his~~ ^{the} ~~case~~ ^{the} ~~is~~ ^{the} ~~was~~ ^{the} ~~4~~ ⁴ times more than in 1942.

Before the execution court, on ~~in~~ ⁱⁿ ~~the~~ ^{the} ~~decree~~ ^{decree} ~~holder~~ ^{holder} it was argued that the valuation in ~~the~~ ^{the} ~~case~~ ^{case} ~~should~~ ^{should}

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be taken to be as (1) on the 29th March, 1945, when the defendant had expressed his inability to return the bangles, or as (2) on the 12th September, 1944, when the plaintiff had sent a notice to the defendant to return the bangles, or (3) in any case, as on the 18th January, 1944, the date of the final decree. On behalf of the judgment-debtor it was contended that the date should be either (1) the 30th April, 1942, when the agency had terminated, or (2) the 9th May, 1942, the date up to which the accounts were taken.

The execution court came to the conclusion that the value was to be assessed as on 30th April, 1942, the date of the termination of the agency. This finding of the execution court was affirmed by the learned Civil Judge in appeal. When the matter came up in second appeal before the High Court the judgments of both the lower courts in this regard were reversed, and it was held that the value of the bangles in question was to be taken as on the 18th January, 1944, the date of the final decree. Aggrieved with the said judgment, the defendant-judgment-debtor has filed this special appeal.

We have heard the learned counsel for the parties. A number of authorities have been cited on both the sides. No case, however, appears to be on all fours with the present one. The facts of the present case have certain peculiar features which may be borne in mind. At the very outset, however, it may be stated that bearing in mind the terms of the agreement, it is quite clear that the plaintiff was the owner of the bangles which he used to send to the defendant, and that the plaintiff remained the owner of the bangles supplied to the defendant throughout. The defendant was merely an agent of the plaintiff. His possession of the bangles was on behalf of his principal, namely, the plaintiff. The unsold bangles had to be returned by the defendant to the plaintiff who was to accept them. The defendant was merely entitled to a certain commission on the sale of the bangles for his profit, therefore, that would have accrued on the sale of the bangles would, therefore, go to the plaintiff. Under the circumstances, it

would appear to us that if there was a rise in the value of the bangles owing to the fluctuation of the market rates at any stage, the plaintiff was entitled to get the advantage of the rise in value and not the defendant, because the plaintiff was and remained the owner of the bangles. The fact that the plaintiff was the owner of the bangles lying with the defendant would seem to be admitted in paragraph 19 of the defendant's written statement itself. In this paragraph the defendant admitted that he had a balance of 1,373 *toras* lying in his stock which were "returnable to the plaintiff in accordance with the terms of the agreement, and which the defendant was ever ready to return and is ready also now." If the defendant admits that the plaintiff was the owner of the bangles which remained in his hands, it is difficult to understand as to how he could refuse to allow the plaintiff the benefit that would have accrued if the bangles had been sold in the market after the value of the bangles had risen.

It may also be noted in this connexion that the value of the bangles in the present case had not risen by any act of the defendant or any expenses incurred by him.

If, for example, the court had ordered the sale of the bangles at any stage of the case, the plaintiff would have been admittedly entitled to the entire sale price obtained in the said sale. Or, if the defendant had stated that he had sold away the bangles at a price which was higher than the usual market rate, then the plaintiff would have been entitled to claim the entire amount. If in these cases the plaintiff would have been entitled to claim the entire amount, there is no reason why the defendant should get any further advantage because of his own misconduct, i.e. by his act of wrongfully withholding the bangles which were found to belong to the plaintiff, and of which according to his own admission the plaintiff was the owner. To come to any other conclusion would be to allow a party to take advantage of his own wrong. It has to be remembered that the defendant was the agent of the plaintiff in this case.

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his position was analogous to that of a trustee. Any detention of the bangles by the agent after demand of the same is made by the owner would constitute a wrong on the part of the agent, and any further detention of the bangles on his part would be a case of continuing wrong. The defendant might have refused to give delivery because he wanted to sell the bangles at a higher price. To approve of such an act is tantamount to allowing a trustee to utilize the property of the owner for his own personal gain. On the other hand, according to the elementary principles of equity, a trustee is liable to disgorge all benefits which he acquires from the trust property, and is liable for the payment of the same to the owner of the property.

It will have to be conceded that if the owner of the property had suffered any damage as a result of any unlawful detention of the property by the agent, the owner could recover damages in respect of the same from the agent. If the owner was entitled to recover damages, then the only question would be whether he would do so in the same suit at the stage of execution or could do it only by a separate suit. The question, therefore, would resolve itself only to one of procedure.

On behalf of the respondent our attention has been invited to a ruling of this Court in *Mani Shanker v. Niranjana Swarup* (1). This ruling would support the contention that a matter like this can be adjudged under Order XXI, rule 31. The following observations in this case are relevant :

"The decree was for possession of certain property. The decree-holder was entitled to get possession over the property in the state in which it was on the date of the decree subject to such wear and tear or depreciation as would happen in the course of nature. If the judgment-debtor misappropriates or wilfully causes loss to the property, the decree-holder is not getting

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the fruits of his decree because he is not getting the property in the state in which he was entitled to get it under the decree."

It was further held that under Order XXI, rule 31, Civil Procedure Code, the execution court has got the power to determine the amount of compensation payable to the decree-holder in such a case.

So far as the equitable aspect of the case is concerned, we fail to see how the defendant can stand to lose by this course of action. There is an option given to the defendant by the decree itself to deliver the bangles to the plaintiff or to pay the value. If he finds that the value ascertained at the date of the decree is too high, it is open to him to return the bangles. The defendant, therefore, cannot be allowed to withhold the bangles with a view to cause wrongful loss to the owner, and to secure unlawful gain for himself by depriving the latter of the property to which he is rightfully entitled.

Learned counsel for the respondent has invited our attention to a number of English cases. We are, however, of opinion that strictly speaking, those cases would not be applicable to India as the forms prescribed in England and India with respect to cases of different classes do not tally. There is, however, a principle laid down in those cases to the effect that where the bailee has got possession of the bailor's goods on behalf of the bailor, and those goods have been detained or sold by the bailee, and there has been a rise of price in their value at the date of the sale by the bailee, the price of the goods should be computed as at the date of the verdict or judgment. The leading case on the subject is that of *Rosenthal v. Alderton and Sons Ltd.* (1). That case related to an action of detinue. In that case it was contended by the defendants,—

- (i) that the value of the goods detained and not subsequently returned should be assessed as at the date when the cause of action arose, i.e. when the defendant refused the plaintiff's claim for in payment

(1) (1946) 1 All E.R. 585.

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(ii) that the value of such goods as had been wrongfully sold by the defendants should be assessed as at the date of sale.

The headnote of the case runs as follows :

“2 (i) The value of the goods detained and not subsequently returned should be assessed as at the date of judgment or verdict.

(ii) The same principles applied whether the goods had been converted (provided that the plaintiff was not aware of the conversion at the time) or whether the defendants failed to re-deliver them for some other reason. The defendants could not improve their position by reason of their own misconduct.”

If in the case of a bailor and bailee, the defendant-bailee cannot take advantage of his own misconduct, we are of opinion that, on similar principle, an agent, in a case like this, should not be allowed to take advantage of his own misdeed.

This case was followed in a subsequent case reported in *Sochs v. Miklos* (1). In another case reported in *Munro v. Willmott* (2) the following statement of law in *Salmond on Torts* (10th Edn., p. 309), was quoted with approval :

“If, on the other hand, the property increases in value after the date of the conversion, a distinction has to be drawn. If the increase is due to the act of the defendant, the plaintiff has no title to it, and his claim is limited to the original value of the chattel If, however, the subsequent increase of value is not due to the act of the defendant, but would have occurred in any case, even had no conversion been committed, the plaintiff is entitled to recover it as special damage resulting from the conversion, in addition

(1) (1948) 2 All E.R. 983.

(2) (1948) 2 All E.R. 983.

to the original value of the property converted; as when goods taken or detained have risen in value by reason of the fluctuation of the market."

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It would appear that in the present case, so far as the goods entrusted in the hands of the defendant are concerned, the position of the defendant would be analogous to the position of a bailee, and, so far the sale of the said goods is concerned his position would be that of an agent. Further, the rise in the value of the goods in the present case was not the result of any act of the defendant or any expenses incurred by him, but was the result of the fluctuation in the market rate.

On behalf of the appellant, learned counsel has advanced a number of points. Firstly, he has invited our attention to Order XX, rule 10, Civil Procedure Code, which runs as follows :

"Where the suit is for moveable, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had."

In this connection the learned counsel has also invited our attention to Form 32 for complaints of suits of this character, and to Order VI, rule 3, which lays down that the form in appendix A, when applicable, may, as far as possible, be used for all pleadings. On the basis of the above provisions of the Civil Procedure Code, the learned counsel has argued that if the present suit is treated as a suit for recovery of specific property, the plaintiff was bound to value the property at the time when he filed his complaint, and the value of the property should, therefore, be taken to be as at the date of the cause of action or as at the date of the suit, and not any date subsequent to the filing of the suit. In this connexion the learned counsel has relied on a ruling of this Court in *Gopal v. Jagdish Singh* (1) which was a case for the recovery of ornaments pawned. In that case it was

(1) A.J.R. 1951 All. 413.

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held that in the event of default the value at the date of the institution of the suit should be the value of the ornaments. There is no doubt that if the present suit had been a suit under Order XX, rule 10, the law laid down in that case would be applicable. Where a suit is brought for the recovery of specific moveable property on the ground that there has been a denial by the defendant to restore the property to the owner, the owner knows that he had lost the property. He, therefore, knows the amount of loss that he has sustained. He is, therefore, in full possession of all the facts and he knows the exact legal position as well as the fact which have given rise to it. This could not be the situation in the present case. The plaintiff could not have brought a suit for recovery of any property, nor did he bring the suit in any such form. The terms of the agreement would indicate that the position was that two sets of accounts had to be maintained—one by the plaintiff who was to supply the bangles and the other by the defendant who was to receive the bangles. The exact position could not, therefore, be ascertained unless there had been an accounting between the parties, and, in fact, the agreement provided for such accounting periodically; but, owing to the refusal by the defendant, there could not be any accounting. It might have been that, as a result of the accounting, the position that finally emerged would be that the plaintiff might not have been entitled to the recovery of any bangles whatsoever. On the other hand, he might be liable to pay certain sums to the defendant. Under the circumstances, it was not possible for the plaintiff to bring a suit for the recovery of property. In fact, it was not until the plaintiff had demanded the recovery of the goods from the defendant, and the defendant had denied the possession of the same that the plaintiff was apprised of the fact that the goods were unlawfully withheld by the defendant. Moreover, until the accounting had taken place the plaintiff would not have been able to say how much were sold by the defendant. It might have been that the entire goods were sold by the defendant. Under the circumstances, we are of opinion

that Order XX, rule 10, has no analogy to the present case, and the rulings based thereon have no application. The rights of the parties were finally clarified and ascertained on the date of the final decree which, therefore, should be taken to be the crucial date for the purposes of the present case.

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Secondly, the learned counsel for the appellant has argued that the rights of the parties in the present case were fixed by a contract, and should be governed by it. It is contended that according to the contract, the date of the return of the goods was the date of the termination of the agency and that should, therefore, be the date for computing the valuation of the goods. It is true that the rights of the parties under the contract were governed by the terms of the agreement, but the question which we are faced with at this stage is not the rights of the parties under the contract, but the legal position that would accrue as a result of the defendant unlawfully withholding the goods after he had been ordered by the court to deliver the same to the plaintiff. This is a position with which the contract does not deal. The final word on the subject is the final decree itself. The final decree ordered the defendant to deliver the goods to the plaintiff and its date should, therefore, be considered to be the relevant date. The question in the present case is analogous to that of a mortgage decree by which the mortgaged property is ordered to be delivered by the mortgagee to the mortgagor. Under such circumstances, if the mortgaged property has received any accession in value, the mortgagor would be entitled to it and not the mortgagee. If the contract is silent on this point, the rights of the parties in such a case are not governed by it, but are governed by law. Under the decree, the plaintiff was entitled to the return of the goods. It so happened that the goods had attained higher value as a result of rise in prices. This higher value is a kind of accession to the property itself, and should go to the owner.

The third point argued by the learned counsel for the appellant was that the plaintiff had paid the amount which he was directed to pay, and, therefore, the

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defendant was right in withholding the delivery of the bangles. This argument seems to ignore certain facts in the present case. The plaintiff had demanded the delivery of the goods from the defendant. The defendant instead of delivering the goods or even undertaking or offering to deliver them, had stated in his objection on the 29th March, 1945, that the goods had already been sold by him long before the suit. This objection was made by the defendant in the year 1945 in spite of the fact that in his own written statement filed in 1942 he had admitted that he was in possession of 1,373 *toras* and the Commissioner as well as the execution court had found him to be in possession of 4,695 *toras* of bangles. In view of the obvious falsity of his own case, it is difficult to understand how it can now be argued on behalf of the appellant that his withholding of the goods was justifiable.

Fourthly, it was argued on behalf of the appellant that the plaintiff had explicitly stated in the plaint that he was reserving his right to file a suit for damages. He could not, therefore, be entitled to any damages in this case. Strictly speaking, we are of opinion that, in a case like this, the court is not decreeing the damages. The term appears to be loosely used to cover a case like this. What the court is actually doing is to order the return to the plaintiff of the propetry, which belongs to the plaintiff himself, and, in the alternative, giving the defendant who is found to be in possession of it, a choice to pay its value to the plaintiff if he chooses to keep the goods with him. Even if the present claim is considered to be one for damages, the question has arisen in the course of accounting, and we are of opinion that it is open to the court, going into the accounts of the parties, to adjust their rights in this fashion. Where the court goes into accounting, it has necessarily to adjust the claims and counter-claims of the parties, and such claims are set off against each other, and the final result is arrived at as a result of mutual accounts taken in this manner. The damages awarded in the case are, therefore, a part of the larger of accounting, and are ancillary to it. We have observed that Order XXI, rule 31,

Civil Procedure Code, sanctions such a course. We therefore, see no procedural defect in giving effect to the respondent's claim.

The last contention on behalf of the appellant is that the learned single Judge should not have assessed the value of the goods at a specific rate, but should have remanded the case to the execution court for further evidence. We are of opinion that there is no substance in this argument. Both the parties filed a schedule giving the admitted rates of the bangles in dispute at various dates, and parties are bound by their admission in this regard. This question was not raised by the appellant at any previous stage, and, in fact, the execution court, as well as the Civil Judge's court, proceeded on the assumption that the rates given by the parties in the schedule jointly submitted by them were correct. The defendant himself relied on these very rates when advancing his arguments in the courts below as well as in this Court.

For the above reasons, we are of opinion that the conclusion arrived at by the learned single Judge of this Court is correct. We see no force in this appeal. We accordingly dismiss it with costs.

Appeal dismissed.

CIVIL MISCELLANEOUS

*Before the Honourable O. H. Mootham, Chief Justice,
and Mr. Justice Chaturvedi*

1956

October, 5

ANAND KUMAR BINDAL (PETITIONER),

v.

THE EMPLOYEES' STATE INSURANCE CORPORATION AND OTHERS (OPPOSITE PARTIES)

Constitution of India, 1950, Art 226—Mandamus, issue of Employees' State Insurance Act, 1948 (as amended), Chapter V-A—Special constitution, provision of—Tax—No contravention of Constitution.

The special contribution payable by an employer under Chapter V-A of the Employees' State Insurance Act, 1948, as

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amended by Act LIII of 1951 is a tax and is not illegal and does not contravene the provisions of any Article of the Constitution of India and no *mandamus* can be issued not to realize it as provided under the Act.

Case-law discussed.

Civil Miscellaneous Writ No. 932 of 1955.

The facts appear in the judgment.

Shanti Bhushan for the applicant.

Jagdish Swaroop for the opposite parties.

MOOTHAM, C. J.—This is a petition under Article 226 of the Constitution. The petitioner is the occupier of a factory in Saharanpur which is engaged in the manufacture of cloth. He was called upon by the Regional Director of the Employees' State Insurance Corporation to pay a sum of Rs.12,484 as a special contribution payable by an employer under Chapter V-A of the Employees' State Insurance Act in respect of a period extending from 1st April, 1953 to 31st March, 1955. The petitioner disputed his liability for payment of this sum or any part of it, and as a consequence of his refusal to pay, steps are now being taken against him for recovery of the amount claimed as though it were an arrear of land revenue, and he is threatened with prosecution under section 85 of the Act. The petitioner contends that the demand is illegal, and the principal relief which he seeks by this petition is the issue of a *mandamus* directing the respondents not to recover from him any contribution under the provisions of the Employees' State Insurance Act.

The Employees' State Insurance Act became law on the 19th April, 1948. Its purpose as stated in the preamble is to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. For the purpose of administration of the scheme of Employees' State Insurance, the Act established a body corporate known as the Employees' State Insurance Corporation on which are to be representatives, *inter alia*, of the Central Government and the States, of

employers and employees and also two members of the medical profession. A Standing Committee and a Medical Benefit Council were also established, the former to administer the affairs of the Corporation subject to its general supervision and the latter to advise the Corporation on matters relating to the administration of medical benefits.

The Act also established a fund known as the Employees' State Insurance Fund which is to be administered by the Corporation for the purposes of the Act, and into which will be paid all contributions recoverable under the Act and such other monies as are received on behalf of the Corporation. The scheme is to be financed by contributions from employers and employees for which provision is made in Chapter IV. The scale of contribution is dependent on the rate of wages paid to the employees, the employers' contribution being approximately double that of the employees.

Chapter V of the Act specifies the benefits to which insured persons—that is to say, all employees in factories or establishments to which the Act applies—and their dependants will be entitled. The benefits are five, referred to respectively as sickness benefit, maternity benefit, disablement benefit, dependants' benefit and medical benefit. The Act also made provision for the adjudication of disputes and claims and for the constitution of an Employees' Insurance Corporation, but with such provisions we have now no concern.

In 1951 the Act was amended by Act LIII of that year. The Amending Act introduced a new Chapter in the principal Act—Chapter V-A—which enacted that so long as the provisions of the Chapter remain in force every employer shall, notwithstanding anything contained in the Act, pay to the Corporation a special contribution at such rate as the Central Government may fix, not exceeding five per cent of his total wages bill. It further provided that this special contribution in the case of factories or establishments situated in an area in which the provisions of both Chapters IV^{and} V are in force shall be fixed at a rate higher than that in the

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case of factories or establishments situated in an area in which the provisions of these Chapters are not in force. The special contribution is, by section 3-D of the Act, made recoverable as if it were an arrear of land revenue.

The Act extends to the whole of India except the State of Jammu and Kashmir [section 1 (2)], and applies in the first instance to all factories other than seasonal factories [section 1 (4)]. Sub-section (3) of this section is important: it provides that the Act shall come into force "on such date or dates as the Central Government may, by notification in the official *Gazette*, appoint, and different dates may be appointed for different provisions of this Act and for different States or for different parts thereof". By virtue of notifications issued under this sub-section, Chapters I, II, III and VIII came into force in the provinces of India on the 1st September, 1948. Sections 44 and 45 of Chapter IV (that is to say, the sections which made provision for the maintenance of registers by employers and the furnishing by them of returns, and for the appointment of inspectors), and Chapter VII came into force on the 1st April, 1950, in all Part A States and in some other areas. The Chapters and sections of Chapter IV, which I have mentioned were, then brought into force on the 24th November, 1951, in all Part B States except Jammu and Kashmir, and on the same date, the 24th November, 1951, the new Chapter V-A was brought into force in the whole of India except Jammu and Kashmir. Chapter IV (except sections 44 and 45), Chapter V and Chapter VI were then on the 24th February, 1952, brought into force in Delhi State and the Kanpur area. These Chapters have subsequently been brought into force in 25 other industrial areas in India, but it was only on the 15th January, 1956, that they were brought into force in Saharanpur, Lucknow and Agra. All, at material times, therefore, the provisions of Chapter V-A, but not those of Chapters IV and V, were in force in Saharanpur, where the petitioner's factory is situate.

The argument has covered a wide field. The first contention of the petitioner is that the special contribution which is payable by him under Chapter V-A is illegal

as being in contravention of Article 31 (2) of the Constitution as it stood prior to the coming into force of the Constitution (Fourth Amendment) Act, 1955. To this the State Government's reply is that the provisions of Chapter V-A of the Act imposing a special contribution constitute a tax or are for the promotion of public health within the meaning of Article 31 (5) (b) (i) or (ii) and are, therefore, not affected by the provisions of Article 31 (2) ; alternatively, that the levy of the contribution is not a compulsory acquisition of property such as is contemplated by clause (2) of that article. The second contention is that section 1 (3) of the Act by conferring upon the Government an uncontrolled power to apply such sections of the Act as it thinks fit in such parts of the State as it selects contravenes Article 14 of the Constitution and renders the entire Act invalid ; and that discrimination has in fact occurred as Chapter V-A but not Chapters IV and V has been brought into force in Saharanpur.

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It is desirable to consider first the second submission, for if that be well founded, the entire Act is invalid.

Section 1 (3) of the Act, which has already been quoted, is in very wide terms. It not only empowers the Central Government to bring the Act into force in different parts of India on different dates but enables it to bring different sections into force in different parts of a State on different dates. The petitioner contends that the Act discloses no legislative policy which would serve as a guide to the Central Government which as a consequence has been vested with a wholly uncontrolled discretion which may result, and, indeed, has resulted, in an unjustifiable inequality of treatment, which is contrary to Article 14.

Now in order to attract the operation of this Article, it is necessary to show that the power of differentiation does not rest on any reasonable basis having regard to the object which the Legislature had in view. The

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Orissa Estates Abolition Act, 1892, contained a provision [section 3 (1)] that :

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"The State Government may, from time to time by notification, declare that the estate specified in the notification has passed to and become vested in the State free from all encumbrances."

The Supreme Court in *Bishwambhar Singh v. The State of Orissa* (1) held that this provision was not discriminatory as the object and purpose of the Act was clear, namely, to abolish the right, title and interest in land of all intermediaries and the discretion vested in the State Government must be exercised in the light of this policy and was not absolute or unfettered. The Court pointed out that from the very nature of things a certain amount of discretionary latitude had to be given to the State Government. "It would", the Court said, "have been a colossal task if the State Government had to take over all the estates at one and the same time. It would have broken down the entire administrative machinery. It could not be possible to collect sufficient staff to take over the discharge the responsibilities. It would be difficult to arrange for the requisite finance all at once. It was, therefore, imperative to confer some discretion on the State Government." For similar reasons section 21 (1) of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952, which provided that "As soon as may be after the commencement of this Act, the Government may by notification in the *Rajasthan Gazette*, appoint a date for the resumption of any class of *jagir* lands and different dates may be appointed for different classes of *jagir* lands" was held to be valid : *Amar Singhji v. State of Rajasthan* (2).

Now the purpose of the Act before us, as stated in the preamble, is "to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto". Although the Central Government

(1) A.I.R. 1954 S. C. 842

(2) A.I.R. 1955 S.C. 504.

has been given a very wide discretion in the matter of bringing the Act into force, the Act itself extends [section 1 (2)], to the whole of India except the State of Jammu and Kashmir. There is nothing to suggest that it is not the intention of the Legislature that in due course the Act should not be brought into force in the whole of the area to which it extends. Although not expressed in so many words, it is, in my opinion, sufficiently clear that the Legislature in enacting this statute intended that the benefits which it provided should, as circumstances rendered it practicable, become available to the employees in all factories throughout India excluding, of course, the State of Jammu and Kashmir. If this be, as I hold it is, the object which the Legislature had in view, further difficulty disappears, for the Act is of such a nature that it is reasonable, if not imperative, that a large measure of discretion be conferred on the Central Government with regard to the manner in which it should come into force. Apart from the setting up of statutory bodies, such as the Employees' State Insurance Corporation, the Standing Committee and the Medical Benefit Council, the Act envisages the constitution of regional boards, local committees and regional and local benefit councils. The provisions with regard to payment of contributions are detailed and for the proper working of the Act, the appointment of qualified inspectors, for which provision is made in section 45, is necessary. The provisions for the determination of those persons who are entitled to benefits under the Act involve the setting up of a considerable organization. Above all, the Act cannot be brought fully into force until the Central Government is satisfied that contributions sufficient in amount have been collected in order to ensure that there are funds sufficient to enable the Corporation to fulfil its obligations under the Act. The discretion which is vested in the Central Government under section 1 (3) is undoubtedly very wide, but I am not prepared, taking into account what I conceive to be the policy of the Legislature and the administrative difficulties of operating the Act, to hold that that discretion involves a contravention of the provisions of Article 14. As was

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pointed out in *Matajog Dobey v. H. C. Bhari* (1) it has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the Government and not in a minor official.

It is, however, said that there has in this case been discrimination in fact. The only circumstance relied on in support of this assertion is that although prior to the 15th January, 1956, Chapters IV and V of the Act had been brought into force in a number of industrial areas in India, they had not been brought into force in Saharanpur District. The petitioner's real grievance is that Chapter V-A is in force in Saharanpur: but it is, and has been since the 24th November, 1951, in force throughout India except in the State of Jammu and Kashmir. There has been no discrimination shown in the application of that Chapter. The bringing into force in Saharanpur of Chapters IV and V appears to confer no direct benefits on employers, but it would immediately result in a substantial increase in the amount of the contribution payable by them. There is nothing to show that the reason for the Central Government not bringing Chapters IV and V into force in Saharanpur was anything but administrative difficulty inseparable from so far-reaching a piece of legislation. In my opinion there has been no discrimination in fact.

What then is the nature of the special contribution payable by an employer under Chapter V-A? In my opinion it is a tax. A tax was defined by LATHAM, C. J., in the Australian case of *Matthews v. Chicory Marketing Board* (2) as "a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for service rendered," a definition which the Supreme Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshminidra Thirtha Swamikal* (3) considered brought out essential characteristics of a tax as distinguished from other forms of imposition. The employer's special contribution under the Employees' State Insurance Act is a compulsory exaction, recoverable in the event of non-payment, as if it were

(1) A.I.R. 1956 S.C. 44. (2) 60 C.L.R. 263. (3) 1954 S.C.R. 1005.

- an arrear of land revenue. It is levied by public authority and being in furtherance of the directive principles declared in Articles, 39, clause (e), 41 and 42 of the Constitution, it is clearly for public purposes, and it is not payment for services rendered. Had the contribution been paid into the Government treasury and formed part of the public revenue, I do not think it would be doubted that the levy is a tax. Does the fact that the contribution is paid into the Employees' State Insurance Fund, which is administered by the Employees' State Insurance Corporation, make a difference? I do not think it does.

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I think that the case of *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited* (1) is instructive on this point. The Dairy Products Adjustment Act—an Act of the Province of British Columbia—provided for the appointment of an Adjustment Committee for the purpose of insuring that producers of milk received the same return whether the milk was sold in fluid form or in the form of manufactured products. Under the Act a levy was made on those farmers who sold milk in fluid form, for which higher prices were paid, and the amount so obtained was to be apportioned by the Committee among those farmers who had sold the manufactured product. A second compulsory levy was to be collected from the farmers for the purpose of meeting the expenses of the Committee, and both levies were recoverable as debts. It is important to observe that the Act provided that both levies were made by the Adjustment Committee, and that the proceeds thereof did not form part of the public revenues of the Province but were wholly at the disposal of the Committee. The Canadian Courts were of opinion that the levies amounted to taxation and that view was upheld by the Privy Council. The levies were held to be taxes because they were imposed by a statutory body for a public purpose and were enforceable by law; and the fact that the one levy was for the purpose of financing the scheme and that the moneys recovered

(1) L. R. [1933] A.C. 168.

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under the other was distributed as a bonus among the traders in the manufactured products did not, in their Lordships' opinion, affect their character as taxation.

This decision was applied by the High Court of Australia in *Matthews v. Chicory Marketing Board* (1). The Marketing of Primary Products Act authorized the establishment of Marketing Boards and enabled the Boards to acquire products which had been declared to be commodities under the Act. The Boards then were to sell the commodities and pay a share of the total proceeds of the sale of the commodity to the producer after making certain deductions for expenditure. Section 32 of the Act authorized the Boards, with the approval of the Governor in Council, to make levies on producers of commodities and to apply the moneys raised by the levies in payment of expenses, in repayment of advances to the Board, in effecting insurance and in working directed to the improvement of the quality of a commodity. The members of the Court, although they differed on the question whether the levy was an excise duty, were all agreed that it was a tax.

In the light of these decisions, it does not appear to be an essential ingredient of a tax that the moneys recovered by the levy must form part of the general revenues of the State. It is enough that, affirmatively, the levy be imposed by a statutory body for a public purpose and be enforceable by law and, negatively, that it be not a payment for services rendered.

Some doubt about the correctness of this proposition arises, however, from an observation made by the Supreme Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar* (2). The Court, after quoting with approval the definition of a tax given by LATHAM, C. J., to which I have referred, expressed the view that the definition brought out the essential characteristics of tax, one of which was that it was an imposition made for a public purpose without reference to any special benefit to be conferred on the payer of the tax. "This is expressed"

(1) 60 C.L.R. 263.

(2) 1954 S.C.R. 1005.

said the Court at page 1040, "by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State". It must, however, be borne in mind that the Court was in this case considering the validity of section 76 of the Madras Hindu Religious and Charitable Endowments Act, 1951, which required every religious institution to pay to the Government such contribution, not exceeding a stated maximum, as may be prescribed. The Act had been passed by the State Legislature and the question was whether section 76 was within the latter's legislative competence. This would not be the case unless the levy was a "fee", in which even it might come under entry 47 of the Concurrent list. The substantial question, therefore, was not whether the levy was a tax but whether it was a fee, for it seems not to have been disputed that if it were not the latter, then it must be the former. The Supreme Court held that the levy was not a fee, the argument that it was being negatived by the fact that the money raised by the levy of the contribution was not earmarked or specified for defraying the expenses that the Government has to incur in performing any services. "All the collections", the Court pointed out, "go to the consolidated fund of the State and all the expenses have to be met not out of these collections but out of the general revenues by a proper method of appropriation as is done in case of other Government expenses." The fact that the contributions in the case, which the Court then had before it, were paid into the consolidated fund of the State was material for the purpose of showing that the levy was not a fee, and in my judgment the observation made by their Lordships that a tax when collected forms part of the public revenues must be read in the light of the circumstances of the case then before the court. I venture to think that the Supreme Court did not intend to lay down that a levy cannot be a tax unless when collected it forms part of the revenue of the State.

Learned counsel for the petitioner has contended that the levy cannot be a tax because it is nothing but the expropriation of money from one group for the

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benefit of another, and he relies upon a passage in the judgment of the Supreme Court of the *United States in United States, v. Butler* (1). The question is, however, in my opinion, whether the levy in any particular case is for a public purpose and it was pointed out in another American case that ". . . a tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class": *A. Magnano v. Hamilton* (2). In the present case there can in my opinion be no doubt that the levy is for a public purpose and I think, therefore, that learned counsel's objection has no force.

I do not, therefore, think that there is any divergence of opinion between the Supreme Court, the Privy Council and the High Court of Australia, and I hold that the special contribution payable by an employer under Chapter V-A of the Employees' State Insurance Act is a tax.

There was some doubt at one stage of the argument whether the amending Bill (which subsequently became Act LIII of 1951), was introduced into Parliament on the recommendation of the President as is required by Article 117 (1) of the Constitution, if it made provision for the imposition of a tax; and the hearing was adjourned for information on this point to be obtained. An affidavit by Sri K. N. Nambiar, Deputy Secretary to the Government of India, Ministry of Labour, has now been filed, in which it is stated that such recommendation was made, and this fact is no longer in dispute.

In the view I take it is unnecessary for me to express an opinion on the other questions which were raised during the course of the hearing. In my opinion this appeal fails and should be dismissed with costs which I would fix at Rs.400.

CHATURVEDI, J. :—This is a petition under Article 226 of the Constitution,

(1) 80 L. Ed. 479, 486,

(2) 78 L. Ed. 1109, 1113,

The petitioner is the occupier of a cloth mill situate in Saharanpur known as "Lord Krishna Textile Mills", hereinafter called the mills. The complaint of the petitioner is that he is being called upon by the Regional Director, Employees' State Insurance Corporation, Kanpur (respondent no. 2), to pay certain sums of money under Chapter V-A of the Employees' State Insurance Act of 1948 (hereinafter called the Act). The Act was passed by the Dominion Legislature in 1948 and received the assent of the Governor General on 19th April of that year. The Act extended to all the provinces of India and sub-section (3) of section 1 provided that it was to come into force on such date or dates as the Central Government may appoint and different dates could be fixed for coming into force of different provisions of the Act in different provinces. By a notification of the Central Government, Chapters I, II, III and VIII of the Act were brought into force throughout India with effect from 1st September, 1948. By another notification of 1st April, 1950, the provisions of sections 44 and 45 of Chapter IV and the whole of Chapter VII were applied to all Part A States and some other areas like Ajmer and Coorg. On 24th November, 1951, all the provisions, mentioned above, were applied to Part B States, and new Chapter V-A, added to the Act by Act no. 53 of 1951, was applied to the whole of India except Jammu and Kashmir. On 24th February, 1952, the rest of the Chapters, namely, Chapters IV, V and VI were applied only to the State of Delhi and to Kanpur area in Uttar Pradesh. After the above date, the above three Chapters have been applied to seven industrial towns in the Punjab, to Nagpur, the greater Bombay, Coimbatore, Hyderabad, Calcutta City, Howrah District, and to four towns in Madhya Bharat and to seven industrial areas in Andhra and Madras. During the pendency of this writ case, the above three Chapters have been applied in Saharanpur, Lucknow and Agra in Uttar Pradesh. It may be mentioned here that the petitioner's mill is situate in Saharanpur.

Chapter I of the Act deals with preliminary matters. Chapter II deals with the establishment of a corporation

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1956 known as "Employees' State Insurance Corporation", which has been made a body corporate. This is the Corporation which is put in charge of the working of the Act and which realizes the contributions from the employers and employees and has been made responsible for the disbursement of the money thus obtained. Certain Standing Committees are also to be constituted, whose functions have been separately defined. Chapter III deals with finance and audit and it provides for the creation of a fund, known as "Employees' State Insurance Fund", and lays down the purposes for which the fund is to be expended ; Chapter IV deals with contributions by the employers and the employees ; Chapter V deals with the benefits which the employees, who are insured under the Act, are to receive and certain general matters ; Chapter VI deals with adjudication of disputes and claims ; Chapter VII with penalties and Chapter VIII with other miscellaneous matters.

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Act no. LIII of 1951 amended certain provisions of the main Act and added a new Chapter, Chapter V-A, which, as already stated, was applied to the whole of the Union of India by means of a notification, dated the 24th November, 1951. Under this Chapter the occupiers of all the factories situate in the Union have to pay a special contribution at the rate fixed by the Central Government, which was not to exceed 5 per cent of the total wage bill of the employer. The actual amount fixed by the Central Government under section 73-A of this Chapter is $\frac{3}{4}$ per cent of the total wage bill. This amount is being levied from 1st April, 1953, on the occupiers of all the factories situate in the Union of India ; though Chapter V, which provides for the conferment of benefits on the employees, was made applicable for the first time along with Chapters IV and VI to the State of Delhi and to Kanpur area in Uttar Pradesh on 24th February, 1952, and has since been applied to a number of other areas at different times.

On the date the present petition was filed Chapters IV, V and VI were not applicable to Saharanpur, but the petitioner was asked to pay under Chapter V-A a total sum of Rs.12,484 for the period, 1st April, 1953 to

31st March, 1955, on account of different quarterly assessments. The petitioner did not pay any of the demands and the Regional Director has sent a requisition to the Collector of Saharanpur to recover the money as arrears of land revenue. He further threatened the petitioner with prosecution under section 85 of the Act. It is accordingly prayed that writs of *mandamus* be issued to the respondents directing them not to recover any contribution from the petitioner under the provisions of the Act, nor to prosecute him under section 85 of the Act. The issue of a writ of *certiorari* has also been prayed for calling for the record of the proceedings from the Collector and quashing the proceedings. I think that the prayer for the issue of a writ of *certiorari* cannot be granted, as the Collector or his subordinates are not taking any judicial or quasi-judicial proceedings. The prayer for the issue of a writ of *mandamus* is the only prayer that may be considered in this petition.

The learned counsel for the petitioner has challenged the constitutionality of the provisions of section 1 (3) and the whole of Chapter V-A of the Act. His contention is that the provisions of section 1 (3) are inconsistent with the provisions of Article 14 of the Constitution inasmuch as sub-section (3) of section 1 gives uncontrolled and unfettered discretion to the Central Government to apply the different provisions of the Act to different provinces or States (or even parts of different provinces or States), whenever it chooses to do so. This might result in the Act not being applied to some portions of the Union of India at all, and the Central Government has thus been put in a position to discriminate between the occupiers of the factories in the different areas. As regards Chapter V-A his submission is that the provisions of this Chapter are inconsistent with the provisions of Article 31 (2) of the Constitution, inasmuch as the Government or the Employees' State Insurance Corporation have been given the right to deprive the factory owners of a sum equivalent to $\frac{1}{4}$ per cent of the total wage bill of their factories without pay-

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ment of any compensation and without there being any public purpose to support the levy.

Mr. Jagdish Swarup, learned counsel for the respondents, has controverted both the above propositions and has further urged that assuming that Chapter V-A is a measure of expropriation falling under Article 31 (1) and (2), it is exempted from the application of the above clauses by clause (5) of Article 31, as it is a measure of taxation and also as it is a measure for the maintenance of public health. He has further contended that Article 31 (2), as amended by the Fourth Amendment Act of 1955, should be applied to the facts of the case, and the amended Article does not apply to a case of mere deprivation of property unless there is a corresponding acquisition of the property by the State or a corporation owned or controlled by the State, which, he says, is not the case here, as the amount is paid to the Corporation and the Corporation disburses it in providing for benefits for the employees of factories.

The contention of the learned counsel for the petitioner concerning the unconstitutionality of sub-section (3) of section 1 has been dealt with in the judgment of the Hon'ble the CHIEF JUSTICE and I respectfully agree with him in the conclusions arrived at by him and also the reasons given therefor. I do not think I can usefully add anything to the judgment. For the reasons given in his judgment, I hold that the provisions of sub-section (3) of section 1 are not inconsistent with Article 14 of the Constitution.

Coming now to the constitutionality of Chapter V-A, the challenge is on the ground that it is inconsistent with the provisions of Article 31 (2) of the Constitution. The learned counsel for the respondents argued, *inter alia*, that the Article applicable to the case is the Article as amended by the Fourth Constitution Amendment Act, which came into force on the 27th April, 1955. I agree with the contention so far that the amended Article has now made it clear that mere deprivation of property would not amount to acquisition within the meaning of the word, as used in Article 31 (2), unless the deprivation

is accompanied or followed by acquisition of the property by the State. But I do not propose to go into this question further because, in my opinion, the case is to be governed by the unamended Article. The amount which is now being demanded from the petitioner is for a period before the Fourth Constitution Amendment Act came into force, the last demand being for the quarter ending 31st March, 1955. It is true that in the case of *Bhikaji Narain Dhakras v. State of Madhya Pradesh* (1) it has been held that even if an enactment is inconsistent with the provisions of Part III of the Constitution, it is void only against the citizens and to the extent of its consistency, with the result that the enactment is not to be taken to be wiped out of the Statute Book but it remains during the period of inconsistency as if it were under an eclipse. When the shadow is removed, the Act again becomes valid and enforceable. But the contention of the learned counsel for the respondents that the Act should be held to be valid even against the citizens during the period of eclipse does not find any support from the above decision. During the period that the Act is inconsistent with the Constitution, it cannot be enforced against the citizens unless the unconstitutionality is removed from a back date. It is conceded by the learned counsel that the Fourth Constitution Amendment Act has not been given retrospective operation and, that being the position, the right of the parties for the period before the amendment would be governed by the unamended Article 31 (2) of the Constitution. It is, therefore, not necessary to consider the effect of the amendment of Article 31 (2) in this case.

I may here dispose of two other short points raised by the learned counsel for the respondents. These points are that this enactment, assuming that it falls under Article 31 (2), is expected from its operation by Article 31 (5) inasmuch as it is a measure of taxation and also a measure to promote public health.

The learned CHIEF JUSTICE has held that the contribution levied upon the factory owners under Chapter

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(1) 1956 S. C. A. 1.

1956 V-A of the Act is a tax and I agree with him. I may, however, add a ground in support of the same view. In Article 366 (28) of the Constitution the words "taxation" and "tax" have been defined as :
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"taxation" includes the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly."

According to this definition, the word "tax" would include any impost, whether general, local or special, and I do not think there can be much doubt that the contribution made payable under the Act is an impost of one or more of the three kinds mentioned in the definition given above. It is a compulsory levy and is clearly an impost on the owners of factories. It is, therefore, covered by the definition of the word "tax" mentioned above.

In the case of *The Commissioner, Hindu Religious Endowments, Madras, v. Sri Lakshmindra Thirtha Swamiar* (1) their Lordships, while considering the distinction between a "tax" and a "fee", observed at pages 1039-40 :

"It is not clear, however, whether the word 'tax' as used in Article 265 has not been used in the wider sense as including all other impositions like cesses and fees ; and that at least seems to be the implication of clause (28) of Article 366 which defines taxation as including the imposition of any tax or impost, whether general, local or special."

The definitions given in Article 366 are generally to be taken to be the meaning of the words defined unless the context otherwise requires. There are a number of places, specially in the entries, where the word "tax" has not been given this wide meaning as the Constitution has used separately the words "duty", "fee" and other such words. In those places the context may require that the word "tax" is not to be understood in the sense of the definition given in Article 366 (28). But while

(1) 1954 S.C.R. 1005.

trying to interpret the word in Article 31 (5) (b) (i) I do not think that it can be said that the context requires the word "tax" to be read in a restricted sense. On the other hand, the context in which the word is used suggests that the word has been used in the wider sense because there would be no point in levying a fee, a duty or a contribution, if compensation has to be paid to the person who is required to pay the duty, the fee or the contribution.

The fact that the enactment falls within Article 31 (5) (b) (i), does not necessarily mean that it falls within Article 31 (2) also. It appears that some enactments may fall under both the provisions and some may not. There may be an enactment which so substantially encroaches upon the rights of the employer in an industrial undertaking that it may fall under Article 31 (2) of the Constitution. If the levy is a tax under Article 31 (5) (b) (i), it would be exempt from the applicability of Article 31 (2). But if the enactment takes away an insignificant right or amount of money, it may fall under Article 31 (5) (b) (i), though not under Article 31 (2). The impugned Act is one concerning which I have come to the conclusion that it does not fall under Article 31 (2) at all. I shall deal with that point a little later.

But I do not think that the Act falls under Article 31 (5) (b) (ii). Section 46 of the Act enumerates the benefits which are to be granted to the employees and only some of these can be said to be for the promotion of health of the employees. The other benefits are periodical payments to an employee in case of sickness, periodical payments in case of a confinement to an insured woman, periodical payments to an insured person suffering from disablement, and periodical payments to dependants of an insured person who died as a result of employment injury. It is really a measure of insurance providing for relief to the employees at times when they are not able to earn their wages due to sickness, disability or other reasons, though medical treatment is also to be provided to injured persons and the relief might be extended to the family also of an insured person. I do not think this

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Act can be said to be a measure providing for public health within the meaning of the expression as used in Article 31 (5) (b) (ii) of the Constitution.

I now come to the point whether Chapter 5-A of the Act contravenes Article 31 (2) of the Constitution. The learned counsel for the petitioner argued the case as if the provisions of this Chapter were to be considered by themselves as a separate piece of legislation, but I do not think that would be a correct approach to the question. The Chapter has been added by the Amendment Act of 1951, but it has been made a part of the Act and the entire Act, including this Chapter, should be considered in order to determine whether it comes within the purview of Article 31 (2) of the Constitution. The Article, as it stood before the amendment, was held to apply even to a case of mere deprivation of property without corresponding acquisition by the State. See *The State of West Bengal, v. Subodh Gopal Bose* (1) and *Dwarkanadas Srinivas of Bombay, v. The Sholapur Spinning and Weaving Company Ltd.* (2) (known as the second Sholapur case). So even if it were a case of deprivation of property, as contemplated by Article 31 (1) and (2), it would fall within the ambit of that Article. But I think that a measure like this completely falls outside the purview of the Article, because an enactment has to be read as a whole in order to determine whether it is a confiscatory piece of legislation or not. The different provisions have to be read in order to determine the main object of the measure and also to see what it actually does. As has been said, it is the pith and substance of an enactment which determines its nature. If the question had arisen under which entry of the legislative lists the Act falls, I would have had no difficulty in saying that it falls under entry no. 47 of the Union list (Insurance) and entry no. 24 of the Concurrent list, and not under entry no. 33 of the Union list, or entry no. 36 of the State list or no. 42 of the Concurrent list, which deal with acquisition and the principles of the payment of compensation.

(1) 1954 S.C. R. 587.

(2) 1954 S.C. R. 674.

If every enactment which results in the deprivation of the least amount of money or the slightest right in other property were held to fall under Article 31 (2) of the Constitution, all measures, fixing minimum wage limits, providing for construction of rest houses by the employers for the employees and for other such amenities, as well as for the curtailments of rights of landholders and the conferment of those rights on the tenants should be held to be inconsistent with Article 31 (2) of the Constitution, unless they provide for payment of compensation to the employer or landlord, which would defeat the very object of the enactment.

It is now well settled that the above types of enactments do not fall under Article 31 (2), but the learned counsel for the petitioner has sought to distinguish the instant case on the ground that Chapter V-A of the Act does not ensure that the amount taken from an employer would be spent in the benefit of his own employees and, during the period which is in question in the instant case, the petitioner's employees were not to be benefited at all, because Chapter V of the Act had not been made applicable to the area where the petitioner's factory is situate. This is certainly a distinction between this case and the others but the question is whether it makes any real difference in the decision of the point under consideration. The distinction would have been real if an enactment, regulating the relationship between the landlord and his tenant and the employer and his employee, had been excepted from the operation of Article 31 (2) of the Constitution. But the different clauses of Article 31 do not make any such exception for the above types of legislation, though exceptions have been made in respect of certain other matters. The Constitution, not having made any such exception, I do not think courts could have thought of themselves grafting it on Article 31. As I understand the decisions of the Supreme Court, I think the position is that these regulatory pieces of legislation have been held to fall outside the purview of Article 31 (2) altogether. I may mention here cases of tenancy legislation in which this question was raised.

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Mention may first be made of the well-known case of *Thakur Jagannath Bux Singh v. United Provinces* (1). Thakur Jagannath Bux Singh, who was a taluqdar of Oudh filed a suit for a declaration that the U. P. Tenancy Act of 1939 was void, and one of the contentions raised by him was that certain provisions of it were inconsistent with section 299 (2) of the Government of India Act, 1935, which section corresponded to Article 31 (2) of the Constitution. While rejecting this contention their Lordships said,

"The answer to this is that a law which regulates the relations of landlord and tenant and thereby diminishes the rights which the landlord has hitherto exercised in connection with his land does not authorize the compulsory acquisition of the land for public or any other purpose ; and, therefore, the question of compensation does not arise."

Section 299 (1) is practically the same as Article 31 (1) of the Constitution but section 299 (2) prohibited the acquisition of land only without payment of compensation. The learned Judges appear to have considered only section 299 (2) ; and were probably not required to consider the effect of section 299 (1).

Thakur Jagannath Bux Singh then filed an appeal in the Privy Council and the Privy Council while dealing with the point observed,

"But in the present case there is no question of confiscatory legislation. To regulate the relations of landlord and tenant and thereby diminish rights, hitherto exercised by the landlord in connection with his land, is different from compulsory acquisition of the land."

Vide *Thakur Jagannath Bux Singh, v. United Provinces* (2).

The above observations show that in the opinion of their Lordships the legislation was not of a confiscatory nature

(1) A.I.R. 1943 F.C. 29.

(2) A.I.R. 1946 P.C. 127, 130.

at all and fell outside the purview of section 299 of the Government of India Act.

In the case of the *State of West Bengal v. Subodh Gopal Bose* (1) the question was of the validity of a tenancy legislation and, though the Supreme Court held by a majority that mere deprivation of property also fell under Article 31 (2) so that the law permitting it must provide for the payment of compensation or lay down the principles therefor, the particular piece of legislation challenged before it was held not to be inconsistent with Article 31 (2) of the Constitution, in spite of the fact that the effect of it was to reduce the rights of the landlord. Hon'ble *Patanjali Sastri*, C. J., who delivered the majority judgment, after observing that the expression "taken possession of or acquired" as used in Article 31 (2) must be read along with the word "deprived" as used in clause (1) and understood as having reference to such "substantial abridgement" of the rights of ownership as would amount to deprivation of the owner of his property, held :

'No cut and dried test can be formulated as to whether in a given case the owner is deprived of his property within the meaning of Article 31 ; each case must be decided as it arises on its own facts. Broadly speaking it may be said that an abridgement would be so substantial as to amount to a deprivation within the meaning of Article 31 if, in effect, it withheld the property from the possession and enjoyment of the owner, or seriously impaired its use and enjoyment by him, or materially reduced its value.'

His Lordship then considered the effect of the enactment and said that it was in line with the traditional tenancy legislation in this country affording relief to tenants whenever the tenancy laws were found to operate harshly on the tenantry and the result of it was not such a substantial abridgement of the rights as to amount to depri-

(1) 1954 S.C.R. 587.

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vation of property within the meaning of Article 31 (1) and (2).

This case again, in my opinion, does not purport to engraft an exception on Article 31 (1) and (2) but it lays down that such a legislation falls completely outside the purview of Article 31 (1) and (2). In order to determine whether a particular piece of legislation falls under Article 31 (1) and (2), it has to be seen whether the result of the measure is to substantially deprive the owner of his rights in the property. Applying this test to the instant case, I do not think that it has the effect of so substantially reducing the rights as to bring it within the purview of Article 31 (1) and (2). What Chapter V-A says is that an employer shall pay to the Corporation a sum not exceeding 5 per cent of his total wage bill, with the result that the wage bill is only slightly increased. We have to consider the situation as a whole and have not to consider separately the case of every rupee that has been taken from the employer or the landlord as the case may be. In trying to determine the validity of Chapter V-A the provisions of the entire Act have to be considered, and the question has not to be determined with reference only to the additional amount, equivalent to a small percentage of the wage bill, which the employer would have to pay. His wage bill having been increased only by a small amount, it cannot be said that Chapter V-A or Chapter IV causes such an abridgement in the rights of the proprietor in his factory as to fall under Article 31 (1) and (2). For the above reasons, I think that the whole Act, including Chapter V-A, falls outside the purview of Article 31 and cannot be said to be inconsistent with the Article.

It was also urged on behalf of the petitioner that there was no public purpose behind Chapter V-A, but I do not think that the submission deserves any serious consideration. This enactment is a measure intended to provide for certain benefits to the employees of the factories situate in the Union of India. The number of citizens involved is substantially large. There cannot be any doubt that the purpose of the enactment is to help this fluctuating class which deserves every consideration.

Ours is a socialistic welfare State and the measure is one which furthers the State policy. Article 43 of the Constitution, contained in the Chapter dealing with directive principles of the State policy, says that the State is to endeavour to secure, by suitable legislation, to all workers, agricultural, industrial or otherwise, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. Reference may be made to Article 42 also. The benefits which the Corporation is intended to provide to the employees are of a nature which would be difficult for any individual factory owner to provide for his own employees, and the legislation attempts to confer these benefits on an all-India basis after taking contributions from all the employers. It is an insurance legislation and the scheme on an all-India basis is likely to be much more beneficial than any scheme directing every individual employer to help his own employees.

For the above reasons, I think that this legislation is not inconsistent with any provision of the Constitution and, in my opinion, this petition should fail.

By the Court—The petition is dismissed with costs, which we fix at Rs.400.

Application dismissed.

APPELLATE CRIMINAL

*Before Mr. Justice Mulla.**

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Criminal Trial—Sanctioning Authority—Sanction under s. 161, Indian Penal Code, but trial also under s. 5(2) of the Prevention of Corruption Act., 1947—Trial, illegality of—Criminal Procedure Code, 1898, s. 230, scope of,

^aSitting at Lucknow.

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Where the sanctioning authority has sanctioned prosecution of the accused only under s. 161, Indian Penal Code, and the trial court tried him also under s. 5 (2) of the Prevention of Corruption Act.

Held, that the trial court could do so under the latter half of s. 230, Criminal Procedure Code and the court was within its rights when it tried the accused under s. 5 (2) of the Prevention of Corruption Act unless the accused is in any way prejudiced by the addition of the charge and no irregularity or illegality is committed by the trial court.

Case-law discussed.

Where the offence was committed on the first of November, 1950, more than six years ago and the accused was subject to two long protracted trials not on account of any delaying tactics adopted by him but because the law was changed and in defending himself the accused had to incur a huge expenditure and the major part of the illegal gratification collected by the accused went to other pockets, the sentence of fine alone will meet the ends of justice and the sentence of imprisonment is set aside but the amount of fine is enhanced.

Criminal Appeal No. 162 of 1954 against the order of Girja Shankar Misra, Special Judge, Anti-Corruption, U. P., Lucknow, dated the 15th February, 1954.

The facts appear in the judgment.

Iqbal Ahmad for the appellant.

The Deputy Government Advocate (P. N. Chaudhri) for the State.

MULLA, J.:—Appellant Lauris E. Jacobs was tried under section 161, Indian Penal Code, and section 5 (2) of the Prevention of Corruption Act (Act II of 1947). The trial court convicted him under section 161, Indian Penal Code, and sentenced him to two years' rigorous imprisonment and a fine of Rs.500, in default further rigorous imprisonment for six months. It passed no orders in respect of the offence under section 5 (2) of the Prevention of Corruption Act. Against this order of conviction the appellant has come up in appeal.

The prosecution story is that the appellant was employed as shed-man in the Loco Shed, Jhansi, in the year 1950. A temporary gang of labourers was recruited in October, 1950, to do some emergent work. The Divisional Superintendent had written to Sri R. A. Hasset, (P. W. 2), who was the Running-shed Foreman

at Jhansi at that time, to recruit this gang. Sri Hassett asked the appellant to carry out the orders of the Divisional Superintendent and engage the casual labour in consultation with the Senior Inspector, Fuel, but the appellant did not observe this direction and made the recruitment himself. This temporary gang of labour operated from the 4th of October, 1950 up to the 31st of October, 1950. Sixteen labourers were recruited and they worked under a permanent hand Rameshwar Prasad (P. W. 12). Dilawar (P. W. 11) was the Muqaddam of this gang. It is alleged that on the 24th of October, 1950, the appellant ordered this gang to collect in the railway yard and he told them that if they pay Rs.50 each as illegal gratification for the Bara Sahib, then an employment card would be issued to them and a permanent employment would be secured for them. The appellant promised to recommend their cases to the officers concerned, if such a payment was made. Bara Sahib was the name by which the labourers called Sri Hassett, the Loco Foreman. The labourers agreed to pay this amount after they received their wages.

On the next day the appellant again came to the labourers with the Employment Officer, Mr. Ward (P. W. 3) and the same demand was made in his presence. The labourers again made the same promise and the appellant wanted someone to stand surety for them. Rameshwar Prasad (P. W. 12) then stood surety for the labourers. After this Sri Ward issued the employment exchange cards. The appellant asked Rameshwar Prasad to collect these cards and to give them back to the labourers after the payment was made by them.

The same evening Rameshwar Prasad went to the house of Sri Bhusaran Sharma, R. S. O., in order to inform him. He, however, did not meet Sri Bhusaran Sharma, but his father met him. He left word with Sri Sharma's father and came back.

The next important date in this case is the 31st of October, 1950. On that date Inspector Lal Chand of the Special Police Establishment (P. W. 13) accidentally visited Jhansi and met the father of Sri Bhusaran Sharma,

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1956 who conveyed this information to him. Sri Lal Chand then immediately called Rameshwar Prasad and recorded his statement. He then contacted the district authorities so that a trap should be laid. On that very date the services of this gang were terminated and they were directed to come to the Loco-shed next morning to take their wages.

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Next morning the labourers with Rameshwar Prasad (P. W. 12) and Dilawar Ali (P. W. 11) went to the railway station to receive their wages. It is alleged that the payment could not be made in the forenoon and the wages were actually paid in the afternoon. The labourers along with Rameshwar Prasad and Dilawar Ali waited in the garden outside the railway station.

Meanwhile the Additional District Magistrate, Jhansi, who was approached by Inspector Lal Chand, deputed Sri M. M. Agarwal, a first class Magistrate, to supervise the trap which was to be laid. Sri Lal Chand and the Magistrate came to the railway garden and from behind some bushes they heard the conversation of the labourers. Sri Agarwal had also called Rameshwar Prasad and the statement made by him to Sri Lal Chand was verified. Sri Agarwal overheard the labourers telling each other that the whole amount should not be paid immediately, but only a part of it should be paid. The labourers were also saying that the money was to be paid to the Bara Sahib as well as to the Employment Exchange Officer. They agreed to pay part of the sum demanded after receiving their wages and pay the balance after they were given a permanent job. Meanwhile, while the labourers were still in the garden, one Sri P. D. Srivastava, an Assistant Station Master, who was on leave, happened to pass that way and Sri Lal Chand requested him to stop and become a witness of the trap. Sri Srivastava agreed and then he went up to the labourers, alleging that he was a brother of Rameshwar Prasad. He also heard the conversation of the labourers. Shortly afterwards the group of labourers along with Rameshwar Prasad, Dilawar Ali and Sri Srivastava left for the Loco-shed. The appellant met them there and directed them to go to Sukkhu's Hotel and wait for him.

there. This Hotel is outside the Loco-shed. As soon as this arrangement was made Sri Srivastava came to the Inspector and the Magistrate and informed them about this plan. The Magistrate and the Inspector then came to the Hotel of Sukkhu. They waited for the appellant, but the appellant did not come to the Hotel. Sri Srivastava was once again sent to the Loco-shed to find out when the appellant was coming to the Hotel. Sri Srivastava on reaching the Loco-shed found the appellant talking to Rameshwar Prasad and giving him directions that the coolies should be sent to the office of the Co-operative Society, which was near the railway bridge. Rameshwar Prasad then came to the Hotel and collecting the coolies went to the appointed place. The Magistrate and the Inspector then took their stand on the railway bridge. At about 5 in the evening the appellant was seen coming with Rameshwar Prasad from the Loco-shed. The two met the labourers and the money was demanded by the appellant. The labourers in accordance with the agreement reached by them in the garden outside the railway station expressed their willingness to pay only Rs.30 each at the moment, but they promised to pay the balance after getting permanent jobs. There was some talk between the appellant and the labourers and finally the appellant accepted the proposal of the labourers. He then asked Rameshwar Prasad to collect the money from the labourers. He also instructed Rameshwar Prasad to prepare a list containing the names of the labourers who were making the payment. By this time eleven labourers were present, as the others had gone away. The appellant then told the labourers that he would be coming back shortly after a wash and meanwhile his directions should be carried out.

Rameshwar Prasad then collected Rs.30 each from the eleven labourers and the total came to Rs.330. He also prepared a list in duplicate containing the names of the coolies and the sum which they paid. He also took down the numbers of the notes on a separate paper, as he was instructed to do so by the Magistrate when he had examined Rameshwar Prasad in the morning.

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After some time the appellant came back on a cycle and a list Ex. P-20 and the notes of Rs.330 were given to him by Rameshwar Prasad. The appellant counted the notes and then checked them from the list. After checking the notes he put them in his pocket and began to ascend the railway bridge. Rameshwar Prasad and Sri Srivastava, who was also in the group of the labourers, followed. The appellant when he left the coolies told them that within a few days they would get a permanent job and he directed Rameshwar Prasad to give back the employment exchange cards to them. When the appellant reached the top of the stairs, he got on his cycle and began to move away. Meanwhile Rameshwar Prasad and Sri Srivastava had given the pre-arranged signal to the Magistrate and the Inspector on the railway bridge and so the Magistrate stopped the appellant and disclosing his identity charged him with accepting illegal gratification. The appellant immediately brought out the notes from his pocket and handing them over to the Magistrate stated that Rameshwar Prasad had surreptitiously put them in his pocket. The labourers had also reached the bridge by this time. The entire group then came down the bridge on the other side and then the Magistrate ordered the Inspector to search the appellant. The appellant then immediately took out a paper from his pocket, put it in his mouth and began to chew it. Sri Lal Chand, however, succeeded in extracting this paper from the mouth of the appellant, but it was torn into six bits, which are material Exs. I to VI. A recovery list was prepared. Rameshwar Prasad also handed over the employment cards of the labourers which were with him. He also gave the paper on which he had taken down the numbers of the notes and the duplicate list of the coolies prepared by him. The Magistrate then recorded the statements of the labourers and the appellant was asked to give a statement. The appellant, however, refused to do so and said that he must consult a lawyer first.

Next day, i.e. on the 2nd of November, 1950, the Magistrate submitted his report to the District Magistrate and placed the recovered articles in the Govern-

ment Treasury. He had already given permission to Inspector Lal Chand to investigate the case. Sri Lal Chand in the course of the investigation obtained the necessary sanction from the General Manager, Central Railways, and then prosecuted the appellant.

I will now give the defence taken up by the appellant. As the appellant was subjected to two trials, he has made no less than four statements in this case. I have already mentioned the first spontaneous exclamation made by the appellant when the Magistrate charged him on the bridge. At that time he had stated that the money was planted in his pocket by Rameshwar Prasad. The second statement was made by the appellant in the first trial on the 24th of November, 1951. In this statement again he admitted that Rs.330 in currency notes and the list Ex. P-20 were recovered from his possession, but he maintained that this money was planted by Rameshwar Prasad. In reply to some other question, he also admitted that he had tried to chew material Exs. I to VI and that some names were in his handwriting in Exs. IV and VI. Exs. IV and VI contain the names of some of the labourers. The third statement was made by the appellant in the second trial on the 25th of October, 1952. It is on the same lines as the earlier statements, only he denied that he put any paper into his mouth or that Exs. I to VI were chewed by him. He added that the witnesses in this case were deposing against him, because he had reported against these men to the higher authorities. The last statement of the appellant is a written statement, which he submitted at the end of the second trial on the 18th of January, 1954. I will give the relevant portions of this statement *in extenso* :

“Paragraph 2. That P. W. 12 (Rameshwar Prasad) was not on good terms with the accused as the accused had occasion to report him to the authorities as stated by D. W. 5 (Mr. Hammill) for attempting to take bribes from coolies working under P. W. 12 and so P. W. 12 kept this in mind to harm the accused at the first opportunity.

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5. P. W. 2 (Sri Hassett) informed accused to tell the temporary coolies that they would not be required after 28th October, 1950, and on this date of 28th October, 1950, orders to this effect were passed two or three times and then cancelled.
6. P. W. 12 (Rameshwar Prasad) made capital out of this incident to work up the men to his plot of harming the accused.
7. P. W. 12 (Rameshwar Prasad) made it clear to the sixteen coolies employed on 4th October, 1950, that it was the accused who was getting rid of them as he desired some bribe which was not forthcoming.
8. After this date P. W. 12 (Rameshwar Prasad) planned with the coolies to collect some money in the shape of bribe from the coolies and to trap the accused.
9. It appears on the 1st November, 1950, P. W. 12 (Rameshwar Prasad) conspired with P. Ws. 4 and 13 (Sri Srivastava and Sri Lal Chand) and one Bhusaran Sharma, the R. S. O., to set a trap for the accused as the said P. W. 12 made out that he was wanting bribe from the coolies.
10. On the other hand P. W. 12 (Rameshwar Prasad) who had the sixteen coolies working under him persuaded them to give him some money on the 1st November, 1950, which was to be given to the accused so that P. W. 12 would secure permanent job for the sixteen coolies.
11. As P. W. 12 (Rameshwar Prasad) was working with accused he arranged to move along with the accused, when the latter was going home in the evening of 1st November, 1950, and so further strengthened the impression on the coolies that it was accused really who desired bribe and if it was given then the permanent jobs would be secured.

12. P. W. 12 (Rameshwar Prasad) and 4 (Sri Srivastava) collected some money from the coolies and most probably made up the lists, etc. and then knowing that accused was attending some meeting and would be coming back waited for him at the bridge and on the pretext of interceding for the coolies moved with the accused up the bridge and on way dropped some notes in the pocket of the accused. This dropping was done by P. W. 12 as he was the master-mind and nearest the accused.
13. Prior to this P. W. 12 (Rameshwar Prasad) had taken a bold chance to accompany P. W. 13 (Sri Lal Chand) to Magistrate and arrange a trap.
14. Having dropped the notes in the pocket the accused was arrested on the top of the bridge and when questioned, naturally the accused put his hand in his pocket and finding some notes in it, handed over the same to the Magistrate P. W. 3 (Sri M. M. Agarwal).
15. Later on going down the bridge and P. W. 12 (Rameshwar Prasad) asking for a further search, because P. W. 12 knew that besides notes he had also put in some paper into the pocket of the accused on the slope of the bridge on the other side, the accused again looked into his pocket and found some other papers.
16. This being the first time such an incident occurred to the accused, he got confused and lost his nerve and feeling that some incriminating things had been planted he got confused and the S. I. P. W. 13 (Sri Lal Chand) tried to snatch them away. It is alleged that accused tried to chew the papers.
17. Due to the confusion and the circumstances that accused was under arrest and the first time in his life and being a respectable

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- person, without legal knowledge, it is not remembered at the moment whether the papers were actually bitten or torn in the scuffle because it may have been that due to P. W. 13 (Sri Lal Chand) using force to see the papers the accused may have tried to snatch his hand away or even tried to bite the hands of P. W. 13 and in that confusion the papers may have been bitten also.
18. Reading the papers Exs. I to VI they have nothing to do with this case and so it is clear that it was in confusion that the papers got torn.
 19. Later after the arrest P. W. 12 (Rameshwar Prasad) tutored the coolies which now numbered only 11 to make the statements they have made and the inducement was that they would be made permanent, which according to them, they have been made permanent.
 22. In his desire for revenge P. W. 12 (Rameshwar Prasad) had taken this chance of even informing the authorities and bringing them down and even if the plan had failed, P. W. 12 would have pocketed the Rs.330 he put into the pocket of the accused on the bridge and so in any case P. W. 12 would not have lost.
 30. P. Ws. 1, 2, 5, 6, 8, 9, 11 are coolies and were made wholly under the control of the police and authorities.
 32. P. W. 12 (Rameshwar Prasad) and P. W. 13 (Sri Lal Chand) are highly interested witnesses who have concocted this false case."

From the four statements of the appellant mentioned above, it is clearly made out that his main contention is that the notes were planted by Rameshwar Prasad.

In view of the defence taken by the appellant there is only one question for decision before me. That question is whether there is a reasonable possibility of these notes being planted and the appellant being in

unconscious possession of these notes. In my opinion the prosecution case is proved not only by means of the oral evidence examined in this case, but also from certain other pieces of evidence which strongly support it. The conduct of the appellant by itself is inconsistent with his innocence.

[The judgment then discusses the evidence.]

I am, therefore, of the opinion that from whatever angle you might approach the evidence, the guilt of the appellant is proved beyond any reasonable doubt.

But the main contention of the counsel for the appellant was that as the sanctioning authority had sanctioned the prosecution of the appellant only under section 161, Indian Penal Code, the trial court had no jurisdiction to try him under section 5 (2) of the said Act and though the trial court did not convict the appellant under section 5 (2), still the fact that he was tried under section 5 (2) vitiated the trial and the conviction of the appellant under section 161, Indian Penal Code, also cannot be maintained in law. Reliance for this contention was placed on a case decided by a single Judge of this Court, *Dharam Swarup v. The State* (1). The learned Judge, who gave this decision, observed :

“The offences under section 5 (1) are not necessarily covered by section 161. In some cases they may be so covered but in others they may not. The offence under section 5 (1) is undoubtedly a graver offence than the one under section 161, the former being punishable for seven years, while the maximum sentence under the latter section is only three years.

Where sanction is accorded under section 161, Penal Code, it does not amount to a sanction for a graver offence defined in section 5 (1) and made punishable under section 5 (2). As already stated, there was no sanction for the prosecution of the appellant under section 5 (2). The facts alleged in the present case do, no doubt,

(1) A. I. R. 1953 Al 137.

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fall both under section 161, Penal Code, and section 5 (1) (d), Prevention of Corruption Act. The question is whether sanction having been granted for prosecution under section 161 could be availed of by the prosecution for the prosecution of the appellant under section 5 (2) of the Act. . . .

It was urged that on the analogy of section 238, Criminal Procedure Code, it may be held that where sanction is granted for a minor offence and no sanction is granted for a major offence and the minor offence is established from the evidence on the record the conviction of the accused may be altered from the major offence to that of a minor offence. In my judgment, this cannot be done. Section 238 assumes that the trial of the accused for the major offence was valid in law. When the trial is valid and it is found that the person charged with a major offence is not guilty of that offence, but is guilty of a minor offence, he may be convicted of the minor offence. But when the trial itself is vitiated on account of certain extraneous facts, like the absence of a previous sanction, the authority of the Court to alter the conviction does not come into play, because the whole trial is vitiated and there is nothing before the Court upon which it can exercise the discretion vested in it under section 238. Criminal Procedure Code. There being no sanction for the prosecution of the appellant under section 5 (2). Prevention of Corruption Act, he cannot be convicted under section 161, Indian Penal Code."

I have given anxious thought to the view expressed above but, with all respect to the learned Judge, I find myself in disagreement with this view. In my opinion the learned Judge came to his conclusions because he

accepted certain premises which he did not test. It also appears from the extract quoted above that section 230, Criminal Procedure Code, which was the relevant section was not placed before him and the counsel for the State wrongly relied on section 238, Criminal Procedure Code, which was entirely inapplicable. A very important and relevant part of the Privy Council decision in *Gokulchand Dwarkadas Morarka v. King* (1) also escaped the attention of the learned Judge.

The rule of sanction as incorporated in section 6, Prevention of Corruption Act, is based on the principle that public servants should be protected from malicious and irresponsible prosecutions. The right to prosecute them has been taken away from individuals and the prosecuting agencies and it has been vested in the departmental heads which are called sanctioning authorities. It is not necessary to enumerate the administrative reasons which have necessitated this salutary rule. This rule acts as a brake on the course of the general law and the sanctioning authorities alone can unloosen this brake, as observed by the learned Judges in *Indu Bhusan Chatterji v. The State* (2) :

“The provision for sanction is a most salutary safeguard. The sanctioning authority is placed somewhat in the position of a sentinel at the door of criminal courts in order that no irresponsible or malicious prosecution can pass the portals of the court of justice.”

It was, therefore, necessary for the prosecution not only to procure the order sanctioning prosecution of an offender but also to satisfy the court that this order was given after the sanctioning authority had fully applied his mind to the facts on the basis of which a charge was levelled against the offender.

In the Calcutta case cited above the learned Judges observed :

“It has now been authoritatively decided that where the terms of a section are as imperative as those of section 6 of Act II of 1947

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a valid sanction is a condition precedent to a valid prosecution. A valid sanction means sanction given after consideration of all relevant facts."

In this case it cannot be challenged that the sanction to prosecute the appellant was given after full consideration. This is apparent from the contents of the sanction itself. In paragraph 1 the detailed facts of the case are enumerated and then comes the second paragraph which runs as follows :

"I Hiranand Pessumal Hira, General Manager, G. I. P. Railway, have gone into the facts of the case and have applied my mind. I am of the opinion that L. Jacobs should be tried in a court of law, for having committed the above alleged offences."

Then follows paragraph 3, which is as follows :

"Whereas under section 6 (c) of Act II of 1947, no court can take cognizance of offences punishable under section 120-B/161, I. P. C. and 161/109, I. P. Code, alleged to have been committed by a public servant except with the previous sanction of the authority competent to remove him from office . . . I do hereby accord sanction for institution of Criminal proceedings against L. Jacobs, for having committed the above alleged offences . . .

In my opinion even if the first part of paragraph 3 had not been included, it would still have been a perfectly valid sanction. The rule of sanction only requires that the sanctioning authority should remove the brake placed on the normal course of law after due consideration of all the relevant facts. It does not and cannot expect a departmental head to be an expert in criminal law and to determine with certainty as to which label will appropriately cover the offence committed by an offender. The same illegal act or omission may be punishable under more than one penal statute and so

long as sanction is given to prosecute an offender for a particular act or omission, which is clearly stated, it is irrelevant and immaterial whether this illegal act or omission constitute the offence mentioned in the order of sanction or some other offence. In other words, the order of sanction only amounts to a permission given by the appropriate authority that a public servant who has committed an offence should be tried for that offence and not that he should be tried under a particular section of any penal statute.

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* Offence is defined in sub-section (o) of section 4 of the Criminal Procedure Code. The definition runs as follows :

“ ‘Offence’ means any act or omission made punishable by any law for the time being in force ”

When a sanction is given, it confers jurisdiction on a competent court to try the offender for an offence meaning thereby the alleged illegal act or omission and not merely to try him under that particular label which is given to it by the sanctioning authority. It is obvious that the rule of sanction does not restrict the rights of any criminal court conferred upon it by the Criminal Procedure Code, once the brake is removed and the criminal proceedings are initiated. The learned Judge who decided *Dharam Sawrup's case* (1) in my opinion overlooked this distinction between an offence and the label put upon that offence. He seemed to think that sanction is given for the label and not for the offence. A valid sanction is necessary only for taking cognizance of a case but once a proper cognizance is taken, the court can exercise and should exercise all the rights given to it under the Criminal Procedure Code. As observed by a learned Judge in *Ram Pukar Singh Watchman v. State* (2).

“Sanction to prosecute is required only for the purpose of taking cognizance of an offence ; once the cognizance is taken, its utility is exhausted and it is no longer needed, either

(1) A.I.R. 1953 All. 37.

(2) 1953 A.L.J. 660.

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during the enquiry into the guilt of the accused or for the purpose of convincing him."

I am in agreement with this view. In my opinion it is the duty of the court to try the offender under that section which in its opinion most appropriately covers the illegal act or omission of the offender. This discretion is given under the provisions of section 230, Criminal Procedure Code. The section runs thus :

"If the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded."

Under this section if the court finds that certain fresh facts have come to its knowledge which have changed the aspect of the case and necessitate an alteration or addition of a charge for which a fresh sanction is necessary then it would stop proceedings in the case and await the new sanction but where the facts remain the same, it will proceed with the altered and added charge on the basis of the sanction already obtained. The real test is whether the new or altered is based on the same facts which have already been considered by the sanctioning authority, or, whether some new facts have come to light in evidence which require its re-consideration. The stress is clearly on facts and not on the penal section applied to those facts. This point was fully dealt with by the Privy Council in *Gokulchand Dwarka Das Morarka v. The King* (1). They observed as follows :

"Mr. Megaw for the respondent has suggested that this view of the law (that the sanctioning authority must apply its mind to the facts of the case) would involve in every case that the Court would be bound to see that the

(1). 1948, A.L.J. 170.

case proved corresponded exactly with the case for which sanction had been given. But this is not so. The giving of sanction confers jurisdiction on the Court to try the case and the Judge or Magistrate having jurisdiction must try the case in the ordinary way under the Code of Criminal Procedure. The charge need not follow the exact terms of the sanction, though it must not relate to an offence essentially different from that to which the sanction relates."

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Their Lordships then quoted section 230, Criminal Procedure Code, and observed :

"The latter words indicate that the Legislature contemplated that sanction under the Code would be given in respect of the facts constituting the offence charged."

It can thus safely be held that sanction to prosecute is given on facts and not under any particular section of any penal law.

The rule of sanction is incorporated in the Criminal Procedure Code, though in another form. Sections 195 to 199, Criminal Procedure Code, lay down that in certain cases proceedings can only be initiated by particular persons or authorities. There are certain offences in which only a court can file a complaint. Sections 193 and 194, Indian Penal Code, are amongst these offences. Both these sections deal with giving false evidence on oath in a judicial proceeding. Section 194 is a graver offence as compared to section 193 and while the maximum punishment under section 194 is transportation for life, the highest punishment under section 193 is only seven years. If the reasoning given in *Dharam Swarup's* case (1) is accepted, then where a court files a complaint under section 193, Indian Penal Code, against an offender, the court who takes cognizance of the case cannot convict him under section 194 although perjury was committed by the accused at the trial of an offence punishable with death. I am unable to accept this reasoning for it ignores the provisions of section 230, Criminal Procedure Code.

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I am, therefore, of the opinion that the trial court acted within its rights when it tried the appellant under section 5 (2) of the Prevention of Corruption Act. It could do so under the latter half of section 230, Criminal Procedure Code. Nothing has been placed before me to show that the appellant was in any way prejudiced by the addition of the charge. I find no force in this legal contention as no irregularity or illegality was committed by the trial court.

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It was urged in the end that the sentence inflicted by the trial court was very severe as the appellant had already lost his job. Whenever a public servant is convicted of such an offence, invariably he will be dismissed from service. This consideration alone, therefore, can never be a good reason for inflicting a light sentence when the Legislature treats it as a grave offence as is evident from the preamble of the Prevention of Corruption Act, (Act II of 1947). But there are two other circumstances which have influenced me in coming to the conclusion that the sentence passed in this case was excessive. The offence was committed on the 1st of November, 1950, more than six years ago, and the appellant was subjected to two long and protracted trials not on account of any delaying tactics adopted by him but because the law was changed. In defending himself he had to incur a huge expenditure. Again I find that according to the prosecution case itself he was acting only as a tool of some persons who were higher up and the first charge framed against him on 24th November, 1951, also points the same way. I cannot help feeling that the major part of the illegal gratification collected by the appellant would have gone to other pockets. For these reasons I am of the opinion that a sentence of fine alone will meet the ends of justice in this case. I, therefore, set aside the sentence of imprisonment but increase the amount of fine from Rs.500 to Rs.1,000. In default of payment of fine, the appellant shall undergo one year's rigorous imprisonment. The fine should be deposited within three months. The appellant is on bail. He need not surrender.

With the modification mentioned above, the appeal is dismissed.

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Appeal dismissed.

APPELLATE CRIMINAL

*Before Mr. Justice Hari Shankar and Mr. Justice Mulla.**

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Criminal Trial—Identification of the accused, principles of.

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Although no hard and fast rules can be laid down for assessing the evidence of identification, some general guiding principles can be stated.

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The evidence of identification is as much subject to the word "proved" in s. 3 of the Indian Evidence Act as any other kind of evidence. Although absolute certainty is not needed, the court is to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. The golden rule of prudence is that probable should be preferred to the possible, unless the possible is supported by irreproachable evidence.

The evidence of identification can be accepted only if the court is satisfied on the following points:

- (1) The witness had at least a fair, if not a good, opportunity of seeing the dacoits.
- (2) The identification parade was held within a reasonable time of the incident.
- (3) The power of observation of the witness is reliable.
- (4) The statement of the witness that he did not know the suspect from before is believable.
- (5) That the witnesses were not given an opportunity to see the accused after their arrest.

Where the investigation is tainted the performance of the witness cannot be accepted at its face value for the reasonable possibility of external aid being given to the witness cannot be eliminated.

Held, that a graduated scale of the number of under-trials to be mixed with the suspects would be most desirable. For example if there are three suspects in a parade, the ratio

*Sitting at Lucknow.

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between the suspects and the under-trials may be reduced from 8 to 1 and this proportion may be decreased progressively when the number of suspects becomes more and more, but in no case, whatever the number of suspects might be, it should become less than 5 to 1.

Case-law discussed.

Criminal Appeal No. 839 of 1954 against the order of P. C. Srimal, Temporary Additional Sessions Judge of Kheri, dated the 22nd October, 1954.

The facts appear in the judgment.

Saraswati Prasad for the appellant.

Assistant Government Advocate for the State.

The judgment of the Court was delivered by—

MULLA, J. :—An armed dacoity was committed at the house of one Ramratan, a resident of village Bechepurwa, police station Kotwali, Lakhimpur, district Kheri, on the night between the 19th and the 20th of February, 1953. Ramratan resided with his brothers Baburam and Ram Autar and other members of the family in separate portions of the same house. At about midnight Ramratan was disturbed in his sleep when a dacoit jumped inside the house and unchained the door. Immediately afterwards, 10 or 12 more dacoits entered the house through the main door. These dacoits were armed with pistols, guns, spears and *lathis*. Seeing the dacoits, Ramratan shouted and his brothers rushed into the courtyard. One of the dacoits fired a shot which hit Baburam. The dacoits then started plundering and this gave an opportunity to Ramratan to slip out of the house. He raised an alarm and, as a result, the neighbours collected and someone set fire to the cattle-shed of Ramratan. During the course of the dacoity the residents of village Mathurapurwa, which is at a distance of about 3 or 4 furlongs from Bechepurwa, also arrived. The burning cattle-shed threw a bright light and the villagers outside saw the features of the dacoits in this light. When the dacoits came out after collecting the looted property, they were pursued by the villagers and then the dacoits fired some shots which injured some villagers including Kumari Maikin. The dacoits could not be pursued after that and they escaped.

After committing dacoity at Bechepurwa the dacoits went to village Mathurapurwa and committed another dacoity at the house of Khushi Ram, a resident of that village. In this dacoity also there was an encounter between the dacoits and the villagers. Ramratan as well as other residents of Bechepurwa, when they came to know that a dacoity was being committed at Mathurapurwa, went there. In the encounter that ensued two persons named Inder Bahadur and Chakkardin lost their lives. None of the dacoits could, however, be apprehended and they escaped.

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Next morning, Ramratan lodged the first information report at police station Kotwali, Lakhimpur, at 10.45 a.m. Lakhimpur is about six miles from village Bechepurwa. Ramratan had gone on a bullock-cart with all the injured persons when he lodged the report. No report was lodged by Khushi Ram separately and it was Ramratan who lodged a comprehensive report in which the facts of both the dacoities were mentioned. When the encounter had taken place at Mathurapurwa, the dacoits had left behind some articles and they were taken by Ramratan to police station Kotwali when he went there. Several used cartridges, two fountain pens, one old *chadar* and a *lathi* were the articles which were deposited by Ramratan when he lodged the report.

The investigation of these two crimes which were recorded as one was conducted by Sri Raj Kumar Singh, the Second Officer of Police Station Kotwali, Lakhimpur. He first went to Mathurapurwa and there prepared the inquest report of the dead body of Inder Bahadur Chakkar who was still alive was sent to hospital. After conducting some preliminary investigation at Mathurapurwa, he came to Bechepurwa and prepared site-plans of both the scenes of the dacoities. Thereafter he examined witnesses and sent the injured persons to Lakhimpur for medical examination of their injuries. The dead body of Inder Bahadur was also sent to Lakhimpur mortuary for post-mortem examination.

As a result of his investigations, the investigating officer came to the conclusion that the same gang of dacoits

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had committed both the dacoities. The *chadar* that was left behind by the dacoits was shown by him to persons at Baragaon, a big village, which is four miles away from the scene of the dacoities. This *chadar* was identified by some persons as that of Anwar appellant. He thereupon arrested Anwar appellant on the 4th of March, 1953. Faqirey, another appellant in this case, was arrested on the 3rd of April, 1953.

While this investigation was going on, it is alleged that two encounters took place on the night between the 29th and the 30th of March, 1953, at two different villages. These villages are Patراسى and Ramnagri. In these encounters the villagers of these two places succeeded in injuring and arresting some dacoits. Two of the accused in this case were arrested in the Patراسى encounter and Babu *alias* Akbar appellant was injured and arrested in the Ramnagri encounter. As Babu was injured, he was sent to Lakhimpur Hospital where he was kept in a closed room and then he was sent to Lakhimpur Jail with his face covered. Another accused, who was arrested in connexion with these two dacoities, was one Balram Das. This arrest took place on the 1st of April, 1953. It is not necessary to mention the arrests of the other suspects in this case.

After the suspects were arrested, they were put up for identification. As they were arrested on different dates, several identification parades were held. Anwar and Faqirey appellants were put up for identification on the 9th of April, 1953, and this parade may be called the first parade. The remaining accused, including Babu appellant, were put up for identification on the 1st of May, 1953. This may be called the second parade. The investigating officer Sri Raj Kumar Singh, who was present outside the jail when this parade was conducted, gave a report on that date that he did not want Babu to be placed for identification before any other witness. Babu could be identified by one witness only in this parade and as this did not suit Sri Raj Kumar Singh, he went back on this report and prayed that Babu should be put up for identification before some other witnesses again. This parade was held on the 16th of May, 1953.

and this may be called the third parade. Balram Das, who was arrested on the 1st of April, 1953, was put up for identification in a separate parade held on the 1st of August, 1953, and this may be called the fourth parade. As the results of these parades were satisfactory the suspects were prosecuted. In all seven persons including the three appellants and Balram Das were prosecuted in this case.

The defence of the appellants was that they were known to the witnesses from before and they were also shown to them after arrest. Balram Das contended that he was falsely implicated because of his enmity with the police. Babu appellant alleged that he had a dispute with one Bachchu Singh who had fired at him and he was then handed over to the police at Lakhimpur Kotwali and was implicated in this case. He also alleged that he was shown to the witnesses at Lakhimpur Kotwali. The defence of the other suspects also was similar. Anwar and Faqirey appellants examined a witness each to establish that the prosecution witnesses knew them from before, but this evidence is worthless and can safely be ignored.

It would be seen from the history of the case given above that the evidence against the accused in this case consisted of the evidence of identification only. The trial court accepted this evidence in the case of the three appellants, but rejected it in the case of the other suspects. It, therefore, convicted Anwar, Faqirey and Babu under section 395, Indian Penal Code, and sentenced each of them to four years' rigorous imprisonment each. We may observe here that if the trial court came to the conclusion that these three appellants had committed this armed dacoity, the sentence inflicted erred on the side of leniency. Perhaps the trial court did so, because at a very late stage when the case was ripe for arguments it was contended before it that these two dacoities cannot be tried together and it split up the trial and tried the offenders in two different cases. As the trial court gave a sentence of life imprisonment to Anwar and Faqirey appellants in the Mathurapurwa dacoity case, perhaps it was for this reason that a light

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sentence was inflicted in the Bechepurwa dacoity case. The trial court acquitted Babu in the Mathurapurwa dacoity case.

It has not been contended before us that a dacoity was not committed at Bechepurwa. The counsel, however, urged that there is no evidence that the same gang of dacoits committed both the dacoities and he relied upon the observations of the trial court in support of this contention. The trial court has given some reasons in its decision for coming to the conclusion that the prosecution has failed to establish that the same gang of dacoits committed these two dacoities. In our opinion the trial court ignored the dominant circumstance, mainly that the two dacoities were committed in such close proximity of time and place. This circumstance in our opinion over-rides the reason which have been advanced by the trial court. We are of the opinion that there can be hardly any doubt that it was the same gang of dacoits who committed these two dacoities.

This question is, however, quite unimportant. The real question is whether the identification by the residents of one village can be used for providing that the dacoits took part in the dacoity which was committed in the other village. As the two trials have been separated, it is not necessary to disagree with the view taken by the learned trial court on this point. The learned trial court came to the conclusion that the residents of Bechepurwa did not go to Mathurapurwa, and similarly the residents of Mathurapurwa were not competent witnesses of the Bechepurwa dacoity. It, therefore, relied upon the identification of only those witnesses who were the residents of the village concerned.

There are certain aspects of the case which indicate that the investigation was not straight forward. We would first take up the first information report. The trial court did not specifically come to this finding, but it can be inferred from its observations that it came to the conclusion that in order to minimize the number of dacoities the investigating agency treated these two dacoities as one dacoity and incorporated the facts of

both the offences in one report. In our opinion the trial court was justified in coming to this conclusion. The report, therefore, ceases to be a spontaneous statement made by the victims of the dacoity. It becomes a dressed-up version. Ramratan disowned all responsibility of giving any details of the Mathurapurwa dacoity. Khushi Ram, on the other hand, stated that he dictated no part of the first information report. It is, therefore, obvious that it was the investigating agency, who as a result of its preliminary investigations incorporated the facts of the two crimes in one report and gave Ramratan the role of dictating this report. The length and the details contained in this report also make it highly probable that it was not the unaided effort of Ramratan. If Ramratan could marshal so many details, it is surprising that he could not describe the dacoits in a better manner. The only description of the dacoits given in the first information report is as follows :

“Some of the dacoits were wearing under-wears ;
while some wearing *dhotis*. They were
speaking in country dialect and were
acosting each other as Babuji.”

This performance is in marked contrast with the details of the incidents of two separate dacoities which are alleged to have been orally given by Ramratan. We have specially drawn attention to the description of the dacoits, for at a later stage we would use it to show that the investigation was not honest, but tainted.

Admittedly, there was plenty of light in both these dacoities. In the Bechepurwa dacoity when the thatch of Ramratan was lighted the fire spread and several other houses were burnt. Even some cattle which were inside the cattle-shed were burnt. It, therefore, cannot be said that the light was not sufficient for the witnesses to see the features of the dacoits. In addition to this the story of a pursuit and an encounter with injuries on the persons of several villagers show that they came in close contact with the dacoits. Similarly in Mathurapurwa dacoity also thatches were burnt and an encounter took place with the dacoits. It was even alleged that *lathis* and swords were used by the villagers and some of the

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dacoits were injured. Under these circumstances it is extremely surprising that the witnesses who were present in a large number, when the first information report was lodged by Ramratan, could give no better description of the dacoits than mentioned above. Such a description could only have been given if the dacoits possessed no distinctive features or if they had taken precautions to cover their distinctive features. It is not possible to accept that Ramratan was so dumb that though he could dictate such a detailed first information report, he could not give a better description of the dacoits.

When the witnesses were interrogated by the investigating agency, they again failed to give any description of the dacoits. Obviously the investigating agency must have interrogated these witnesses with a view to trace out the offenders and they must have questioned the witnesses about the features of the dacoits. If in spite of such a questioning the witnesses could not give any description, it only presents two possibilities: (1) The dacoits were not well seen and, therefore, the witnesses could not give any description. In view of the light that existed in this case and the encounters that took place between the witnesses and the dacoits, it is difficult to hold that the light was not sufficient. If we come to this finding in such a case, it would be difficult to find in any case that there was sufficient light. We are, therefore, satisfied that this possibility is not applicable to the circumstances of the case. (2) The investigating agency made no attempt to find out the description of the dacoits from the witnesses as it intended to prosecute its own list of suspects. This seems to us to be the probable explanation of this lack of description both in the first information report and the statements made by the witnesses during investigation. This suspicion is greatly strengthened by the prosecution of Balram Das in this case. The trial court acquitted Balram Das. No less than nine persons had identified him in the jail parade. The trial court observed:

"Balram Das is easily 6 feet in height. His long hair of the head are flowing up to his shoulders. He has also a big beard. Apart

from the height, the beard and the long hair on the head of Balram Das are such features that no one could fail to notice them if Balram Das had been among the dacoits. It is not mentioned in the First Information Report Ex. P-1 that any dacoit had a long beard and long hair on the head. No one mentioned to the investigating officer during the course of the investigation that one dacoit had a long beard and long hair on the head. The witnesses who had identified Balram Das could give no reason why these special features of Balram Das were not disclosed to the investigating officer. In my opinion the absence of prominent features of Balram Das in the First Information Report and the absence of the description of the features of Balram Das in the statements of the witnesses made to the investigating officer go to show that no dacoit of the description of Balram Das was among the dacoits."

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In our opinion no exception can be taken to the reasoning of the learned trial court on this point. It is, therefore, clear that the investigating agency wanted to implicate Balram Das in this case.

There is another circumstance which makes this extremely probable. We have mentioned above that Balram Das was arrested on the 1st of April, 1953. Balram Das was not put up in any identification parade in connexion with this dacoity up to the 1st of August, 1953. No explanation has been offered why Balram Das was not put up in an identification parade for four months. Balram Das, it appears, was primarily arrested in connexion with some other offence and the investigating agency for its own reasons decided to prosecute him in this case, also. The way Balram Das was identified again strongly points to his being shown to the prosecution witnesses after arrest. Balram Das was put up in a parade on the 1st of August and two

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dacoities had occurred on the night between the 19th and the 20th of February, 1953. The parade was, therefore, held about $5\frac{1}{2}$ months after the date of the dacoity. One would expect that after such a long lapse of time the majority of witnesses would not be able to identify him as the image in their mind would fade out, but when this parade was held no less than nine witnesses succeeded in picking out Balram Das. This remarkable feat of memory and observation, when it is committed by so many witnesses, is by itself a circumstance to indicate that the identification is not a result of observation, but of something else. The trial court explained this by holding that Balram Das had distinctive features, which we have mentioned above, when he was put up in the parade. This explanation does not go far enough. A person is not identified on account of distinctive features but because the witnesses are told about the distinctive features. We are, therefore, satisfied that at any rate in the case of Balram Das the investigating agency gave the witnesses either an opportunity to see him or they described his distinctive features to these witnesses which enabled so many of them to pick him out. This naturally discredits the evidence of identification to a great deal even in the case of other suspects.

The way Anwar appellant was traced also seems suspicious to us. According to Sri Raj Kumar Singh, he showed the old used *chadar* left behind by the dacoits at Mathurapurwa to the residents of Baragaon and there P. W. 40 Shahzad and some others recognized this *chadar* as that of Anwar. It is not possible for us to accept that an old used *chadar* is an identifiable article. No distinctive marks existed in this *chadar* and one old used *chadar* would be very much like another old used *chadar*. We are, therefore, of the opinion that, whatever the sources of information might be, the investigating agency did not reach Anwar by means of the old used *chadar* that was left behind.

The conduct of Sri Raj Kumar Singh in not prosecuting a person who was named by Chakkar deceased in his dying declaration also makes the investigation highly

tainted. Chakkar received a stab wound in his chest and abdomen and he died in the District Hospital, Kheri, on the 20th of February, 1953, at 6.30 p.m. As his condition was dangerous, his dying declaration was recorded at the Hospital by a Magistrate. In this dying declaration Chakkar named one Dirgaj Singh of Lakhnapurwa as one of the dacoits. Sri Raj Kumar Singh not only failed to prosecute Dirgaj Singh, but suppressed this dying declaration. We will quote an extract from the statement of Sri Raj Kumar Singh himself :

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“ The Kotwal had told me that dying declaration of Chakkar had been recorded. Bhagwan Swarup, the Court Moharrir of the Court of Extra Magistrate, had given me a copy of the dying declaration. That copy is attached to the case diary. I did not see the original dying declaration. I did not file the dying declaration as I did not think it necessary to file it. In the copy of the dying declaration, one dacoit was named. I did not challan that man and did not get him identified by any witness. That man lives at a distance of half a mile from Bechepurwa. Dirgaj Singh of Lakhnapurwa was named in the copy of dying declaration.”

It is surprising that Sri Raj Kumar Singh succeeded in losing the original dying declaration and the trial court also made no effort to trace it. It was a most important piece of evidence and the prosecution was permitted to suppress it. The least inference that can be drawn is that this dying declaration, if produced, would have been unfavourable to the prosecution case. Sri Raj Kumar Singh by not prosecuting Dirgaj Singh destroyed the evidentiary value of identification himself. There is no indication that Chakkar had any animus against Dirgaj Singh when he named him. He had received an injury from front and by means of a sharp-edged weapon, which would bring his assailant close to him. With all

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the alleged light that existed, he was in a very good position to identify his assailant. His evidence alone could have been accepted by the trial court to convict Dirgaj Singh and yet Sri Raj Kumar Singh did not even prosecute him and we do not know whether Dirgaj Singh was even apprehended. These circumstances raise something more than a mere suspicion in our minds that Sri Raj Kumar Singh entered into a deal with Dirgaj Singh which was profitable to both sides. The real culprits were permitted to escape and the investigating officer was ready with his list of substitutes.

In assessing evidence of identification it is neither possible, nor desirable to lay down any hard and fast rules, for there is an infinite variety of situations and circumstances in which a witness gets an opportunity of seeing the culprits, but still we are of the opinion that some general guiding principles can be stated. The trial courts are repeatedly making the mistake of following a rule of thumb when they assess the evidence of identification and they do not subject it to the tests of prudence. It is one of the basic principles of criminal law that a fact or circumstance should be proved against an accused before it can be relied upon and used against him. A fact is held to be proved only when it fulfils the definition of the word "proved" given in section 3 of the Indian Evidence Act. The evidence of identification is as much subject to this definition as any other kind of evidence, but it seems to us that in assessing the evidence of identification the trial courts do not apply the tests provided in this definition. It is true that an absolute certainty is not needed, but the court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. What is the approach of prudence? Prudence in our opinion requires that the court should approach the evidence with the reasonable doubts of an intelligent person and accept it only if those doubts are removed. This does not mean distrusting the evidence, but only subjecting it to reasonable tests. It certainly excludes from its orbit the blind faith of a

true believer for prudence and credulity do not go together. It is this second kind of approach which is coming to our notice frequently in dacoity cases.

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What in essence is the evidence of identification? At its best it is the recognition of a stranger's face seen momentarily during the stress and excitement of an incident in torch light or some other artificial light after a lapse of several days or months, as the case may be, and the identifier claims that he carried this image all this time in his mind and, when he went to the identification parade, the image in his mind corresponded with the features of a suspect in the parade whom he accordingly picked out. It can therefore, be accepted only if the court is satisfied on the following points :

- (1) The witness had at least a fair, if not a good opportunity of seeing the dacoits. This naturally raises the subsidiary questions of sufficiency of light and the proximity of the witness to the offenders.
- (2) The identification parade was held within a reasonable time of the incident. The image of a stranger's face is likely to fade out as the days pass by and the court should be satisfied that, when the witness picked out a suspect, he did not do so after such a length of time that a person possessing a normal power of observation and memory was not likely to retain the image for the relevant duration.
- (3) The power of observation of the witness is reliable. This should be tested from two angles :
 - (a) That when the parade was held the witness was really tested and it was not made too easy for him to pick out the suspect. Questions like these arise. Were sufficient number of persons mixed with the suspect or not? Were proper precautions taken against his

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distinctive marks or not? Was the identification parade a genuine test or a farce?

- (b) That the witness did not commit so many mistakes which would make a reasonable person doubt his capacity for observation. These mistakes whether committed in the same parade or in some other parade are to be considered in assessing the power of observation of the witness. It may be that for satisfactory reasons the court may not attach importance to these mistake, but they cannot be completely ignored.
- (4) The statement of the witness that he did not know the suspect from before is believable. Such circumstances, for example, that the accused lived in the adjoining village or on account of relationship or business he occasionally came to the village of the witness should be considered in connexion with this point.
- (5) That the witnesses were not given an opportunity to see the accused after their arrest. The most important point in this connexion is whether the investigation conducted in the case inspires confidence or not. The moment the court finds that the investigation is tainted, it should be on its guard. While small delinquencies may not destroy the evidence of identification, but where there are major delinquencies and the investigation is highly tainted, it would be against the rule of prudence to accept the evidence of identification. Once the investigation becomes tainted, the evidentiary value of the police records is gone and they cannot be relied upon. In such a case the fact that the investigating agency was hostile to an

accused and this could have been a reason to implicate him falsely also becomes important.

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We have given a sketchy outline of the considerations that should be weighed by the court before it makes its final assessment and in reaching its conclusions the court should always follow the golden rule of prudence—namely, that the probable should be preferred to the possible, unless the possible is supported by irreproachable evidence.

The reason why the evidence of identification is to be subjected to these tests is quite obvious. The evidence of identification at its best is a weak type of proof, for it depends entirely upon the capacity of a witness to register a true impression in his mind and then keep it in his memory. The chances of a mistake are far greater in this type of evidence than where the witness deposes about facts within his knowledge. An honest witness can seldom say more than this that the man whom he picked out in the parade resembled the man whom he saw at the time of the incident. The resemblance can so often be deceptive. The human face has so much in common that it is only the formation of details which puts a distinctive stamp upon the face of an individual. This truth is brought home to us when we see people of a different country or race. Even for persons whose eyes are far more trained and observant than the eyes of ordinary villagers, it is not easy to pick out a Chinese or a Japanese, whom they have cursorily seen before, from amongst a group of their countrymen. They all look so much alike. The reason is that the individual characteristics of a face do not get impressed upon the mind unless a man is frequently seen and only the broad general features are noticed. It is well-known that a basic resemblance exists between the members of a family and acquaintances who do not know them intimately are frequently mistaking one member for another. In those cases where a person disappears or is wanted by the Police and a detailed description of his appearance is published, it

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Mulla, J. is not easy to spot the individual with the help of this description for it seems to fit so many persons. We have enumerated all these facts only to stress that the evidence of identification at its best is of a weak character and it can be accepted only where the investigation is above board. Where the investigation inspires confidence and the witness was fairly tested before he picked out the suspect, the demands of prudence are satisfied and the court feeling re-assured rejects the possibility of a coincidence, which becomes remote. But where the investigation is tainted, the performance of the witness cannot be accepted at its face value, for the reasonable possibility of external aid being given to the witness cannot be eliminated.

It was perhaps for these and similar other reasons that the High Court has from time to time laid down certain rules of caution in order to test the observation and memory of identifying witnesses. The trial courts are, however, frequently either ignoring or misunderstanding and misapplying these rules. Only two of these rules are relevant to this case. We will confine our observations to these two rules.

The first rule relates to the number of under-trials to be mixed with a suspect in order to eliminate the reasonable possibility of a chance identification and to make the results of identification acceptable. The second rule stresses that the performance of the witnesses in other parades is also relevant in assessing his power of observation.

In *Emperor v. Chhadammi Lal* (1), a Bench of this Court made the following observations :

“As regards the evidence of the identifying witnesses, the respondent was mixed up with only five under-trials. The value of identification depends on the factor which minimizes the possibility of chance as much as possible. It appears that a practice has been established on account of certain observations made in the judgment in

(1) A.I.R. 1936 All. 373.

Asa Ram Ganga case to mix five under-trials with a suspect for purposes of identification proceedings. The observations in the judgment seem to have been misunderstood because those observations were made in connexion with a case in which there were a large number of suspects who were put up for identification. In cases in which there is only one or two suspects to be put up for identification, the proportion of one to five cannot be regarded as satisfactory. There should be at least 10 under-trials for each suspect in such cases because every effort should be made to minimise the possibility of a chance which in the first instance can be done by mixing as many persons as possible with the suspect who is put up for identification."

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To the best of our knowledge this decision has neither been distinguished, nor over-ruled by any subsequent decision of the High Court. In our opinion it lays down a salutary rule of caution and it was accepted and followed by us in *State v. Bharosey* (1). This rule was again reiterated by another Bench decision of this Court (Lucknow Bench) in *State v. Supwa* (2). Again a learned Judge in *Satya Narain v. The State* (3), although he did not refer to *Chhadammi Lal's* case (4), observed as follows at page 394 :

"The proper way to hold identification proceedings is to put up each suspect separately for identification mixed with as large a number of innocent men as possible, in any case not less than nine or ten."

The reason for this rule is clear. It is an attempt to ensure that the identifying witnesses would be subjected to a real test and it would not be made too easy for them to pick out a suspect. The trial court accepted this rule of caution in the case of Balram Das, but for

(1) A.I.R. 1955 NUC All. 5287.

(3) A.I.R. 1953 All. 385.

(2) Criminal Appeal no. 41 of 1955,
decided on the 24th April, 1957.

(4) A.I.R. 1936 All. 373.

1957 unaccountable reasons it ignored this rule in the case
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v. while discussing Balram Das's case observed.
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"Sri K. M. Ali (P. W. 27) who conducted the identification proceedings of Balram Das stated that he mixed eight under-trials with Balram Dass when Balram Dass was put up for identification. In the case [*Emperor v. Chhadammi Lal* (1)] it has been held that where only one or two suspects are put up for identification then at least ten under-trials should be mixed. As, however, only eight under-trials were mixed with Balram Dass, so the evidence of identification against him cannot be accepted."

Anwar and Faqirey appellants were put up for identification in the first parade held on 9th April, 1953, and only 14 under-trials were mixed with them. There was thus a clear breach of the rule of caution mentioned above. It is surprising that the trial court considered the ratio of 8 to 1 unsatisfactory in the case of Balram Das, but it felt no hesitation in accepting the evidence of identification against these two appellants, when the ratio was only 7 to 1. Perhaps the trial court over-looked the fact that only 14 under-trials were mixed with these two appellants. While we would not like to make a categorical observation that the ratio 7 to 1 in the case of one or two suspects *ipso facto* destroys the results of identification, we feel no hesitation in observing that it considerably diminishes the value of identification, and, unless the investigation is absolutely above board, it would not be prudent to place any reliance on such identification. We have already given our reasons above for holding that the investigation in this case was highly tainted and so in our opinion it would not be safe to accept the results of identification in this case.

The learned counsel for the State has placed certain decisions before us in which a proportion of five under-trials to one suspect was considered satisfactory and in

(1) A.I.R. 1936 All. 373.

some cases even a lesser ratio, though adversely commented upon, was accepted. So far as the second category of cases are concerned, we may say so with respect to those Judges who gave those decisions that their view is unacceptable to us. Their view, in our opinion, is in conflict with the definition of the word "proved" in section 3 of the Indian Evidence Act. Unless a witness is fairly tested, it is not possible to accept his identification and a ratio of less than 5 to 1 is not sufficient to test the witness as it makes it easy for him to pick out a suspect. It is, therefore, not necessary for us to enumerate these decisions.

As regards the other category of decisions in which a ratio of 5 to 1 was considered satisfactory, our attention was drawn specially to two Bench decisions of our High Court. These two cases are *State v. Wahid Bux* (1) and *Dal Chand v. The State* (2). The learned Judges in *Wahid Bux's* case (1) observed :

"Of course, it is always better to have as large a number of persons mixed up with the accused as possible. But no hard and fast rule can be laid down and we are of the opinion that if five times the number of the accused persons are mixed with them, it cannot be said that there is any flaw in the identification proceedings."

This point of view was acceptable to the learned Judges, who decided *Dal Chand's* case (2). They observed :

"Learned counsel was not able to point out to us any authority in support of the proposition that the proportion of 5 : 1 between the number of under-trials mixed and the number of suspects was defective in law. We are not aware of any such law, nor has the learned counsel been able to point out to us any such law."

It would be seen from the extracts quoted above that *Chhadammi Lal's* case (1), escaped the attention of the learned Judges in both these cases. Again there is no

(1) A.I.R. 1953 All, 314.

(2) I.L.R. [1953] All. 856.

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conflict between these decisions and the rule of caution laid down in *Chhadammi Lal's* case (1). One relates to identification proceedings where there are a large number of suspects put up in the parade and the other relates to proceedings where there are only one or two suspects. The trial courts have omitted to notice this difference and they seem to think that the two decisions cited above are also applicable to those proceedings where only one or two suspects are put up for identification. This error on the part of the trial court was noticed in *State v. Supwa* (2), and it was observed :

“Thirdly we find that the respondent and one other suspect were put up in a parade in which only 15 other under-trials were mixed. The rule of caution laid down by this Court in more than one Bench decisions is that where there are one or two suspects, the ratio of under-trials to be mixed with the suspects should not be less than ten to one. It is, therefore, clear that the rule of caution laid down by the High Court was ignored by the Magistrate when he conducted the identification proceedings. Either the Magistrate was ignorant of these decisions, or he took his law not from the decisions of the High Court, but from some other source. At any rate we see no reasons to ignore the salutary rule of caution laid down by the High Court and the results of the identification on this ground alone could have been discarded by the trial court. There seems to be a misunderstanding in the minds of the trial courts about the decisions of the High Court on this point. In some cases, where a large number of suspects were put up in the parade, the High Court has laid down that

(1) A.I.R. 1936 All. 373.

(2) Criminal Appeal no. 41 of 1955 decided on the 24th April, 1957.

a ratio of five under-trials to one suspect is not unsatisfactory. Where the trial courts go astray is that they . . . apply the observations laid down in cases of a large number of suspects to cases in which there are only one or two suspects put up in the parade. There is no conflict in these decisions. Only the trial courts have failed to understand that a ratio of 5 to 1 may be acceptable in those parades where there is a large number of suspects. but a ratio of 10 to 1 is desirable where there are only one or two suspects. The reason is quite obvious. There should be two considerations before a Magistrate when he is conducting an identification parade. The first consideration is that witnesses should be really tested and this necessitates that quite a large number of under-trials should be mixed with each suspect. The second consideration is that the parade should not become so unwieldy that witnesses may get bewildered by the numbers in the parade. It is by synchronizing these two considerations that a correct approach can be made. Where there are only one or two suspects, mixing of 10 under-trials with each suspect will not make a parade unwieldy, but if there are 7 or 8 suspects and the same rule is applied, then the parade will become unwieldy. It is for this reason that a ratio of 5 to 1 is acceptable in the case of a parade where there are several suspects, but where there are only one or two suspects, this ratio does not satisfy the rule of caution."

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We are in agreement with the observations made above. In our opinion a graduated scale of the number of under-trials to be mixed with the suspects would be most

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desirable. For example, if there are three suspects in a parade, the ratio between the suspects and the under-trials may be reduced to 8 to 1 and this proportion may be decreased progressively when the number of suspects becomes more and more, but in no case, whatever the number of suspects might be, it should become less than 5 to 1.

As in our opinion the investigation was tainted and the number of under-trials mixed in the parade was unsatisfactory, we do not think it safe to accept the evidence of identification against Anwar and Faqirey appellants.

Coming to the case of Babu appellant, we find that the trial court committed two glaring errors in assessing the evidence of identification against him. Firstly, it completely ignored the fact that this appellant without any explanation was put up in two parades. This circumstance by itself should have raised a doubt in the mind of a prudent person, but it was not even considered by the trial court. While it is open to a court to accept or reject a grave criticism that can be levelled against the testimony of a witness, it is certainly not open to it to close its eyes and ignore the criticism altogether. It is the duty of a court to present a true picture of the case and where important criticisms are not even mentioned in the decision, the judgment ceases to be a judicial determination as it presents only an incomplete picture.

We have mentioned above that Babu was first put up for identification on 1st May, 1953. On that day Sri Raj Kumar Singh submitted a report that he did not want Babu to be placed for identification before any other witnesses in any subsequent parade. Babu, however, could not be satisfactorily identified in this parade and thereupon Sri Raj Kumar Singh went back upon his report and called some other witnesses to a second parade, which was held on the 16th of May, 1953. When Sri Raj Kumar Singh was cross-examined on this point, he could give no reason why after giving up certain witnesses, he again insisted that a second parade

should be held. Any prudent man would have hesitated to accept the results of the second parade, but the trial court considered this circumstance as of no importance and ignored it completely. In our opinion the circumstance mentioned above lends strong support to the contention of Babu that the witnesses were given an opportunity to see him. It is at any rate the most natural explanation of the conduct of the investigating officer. The trial court convicted Babu appellant upon the identification of two witnesses, P. W. 2 Chandra Bhal and P. W. 10 Baldeo. Baldeo was not sent to the parade held on the 1st of May, 1953, and he identified Babu on 16th May, 1953. His identification is absolutely worthless and it must be discarded from consideration. This leaves only one identification against Babu and it cannot be considered sufficient to prove the case against him.

The second error committed by the trial court was that when assessing the evidence of identification, it ignored the mistakes committed by some of the witnesses in other parades. The trial court observed :

“ Babu has been correctly identified in jail identification, in the court of the Committing Magistrate and in the Court of Session by Chandra Bhal P. W. 2 and Baldeo P. W. 11. None of these witnesses made any mistake in jail identification.”

This statement is again a half truth for basically it is incorrect. These witnesses did not make any mistake when they picked out Babu, but they made mistakes in the other parades. It is repeatedly coming to our notice that the trial courts have misunderstood the rule laid down by the High Court and they completely overlook the mistakes committed by the witnesses in the other parades. The High Court to the best of our knowledge never laid down that the mistakes committed by witnesses in other parades are wholly irrelevant. The decisions of the High Court were explained in *Bechu v. State* (1) by one of us and it was observed :

(1) 1957 Cr.L.J. 113.

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"It is only those parades which are held long after the relevant parade which could be ignored from consideration. The parades which are held prior to the relevant parade cannot be ignored. Similarly, parades held almost simultaneously or shortly after the relevant parade have also to be considered."

We are in agreement with the view expressed above, for any other interpretation would amount to a deletion of section 146 of the Indian Evidence Act. It cannot be doubted that where a witness makes a mistake in identifying a suspect, it discounts to a certain extent his power of observation and it is for the court to decide whether the mistakes which he has committed are sufficient to make his identification doubtful or not. To hold that only the performance in the relevant parade should be considered is almost equivalent to holding that the circumstances which discredit a witness should not be considered. The High Court never meant to lay down such a rule. It only stressed the importance of the performance of a witness in the relevant parade, but it issued no directions that the other parades which are held previously or near about the time of the relevant parade should be ignored. The rule of approach to the evidence of identification is clearly stated in *State v. Wahid Bux* (1). The learned Judges observed :

"Normally the result of identification proceedings in which a particular accused was put up must alone be taken into consideration in deciding this question. It is upon the basis of it that it must be held whether identification is good and reliable, or fit to be discarded. Other identification proceedings in which the particular accused was not put up for identification and other accused were put up are immaterial except in so far as an inference may be drawn against the power of observation of the

(1) A.I.R. 1953 All. 314.

witnesses. This inference may be drawn from these other identification proceedings when they were held either prior to the identification proceedings relating to the particular accused or simultaneously with or shortly after it. But no conclusion can be drawn from these other identification proceedings if they were held long afterwards, because by the lapse of time a witness may lose that freshness of impression which he might have retained at the time when the proceeding connected with the particular accused was held. Therefore, identification proceedings held long after the particular proceedings with which the court is concerned should not be taken into consideration in weighing the evidence of identification with regard to a particular accused."

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It is surprising that in spite of the clear language of this decision the trial courts misinterpret and misapply it.

Testing the evidence of the two identification witnesses against Babu in the light of their earlier performance, we find that P. W. 10 Baldeo failed to identify any one correctly in the first parade held on 9th April, 1953 and committed two mistakes. This performance together with the fact that he was not sent to the second parade held on 1st May, 1953, leaves little doubt in our minds that the memory of Baldeo was revived by external aid when he went to the third parade and picked out Babu appellant.

For all the reasons mentioned above, we set aside the conviction of all the three appellants Anwar, Faquirey and Babu under section 395, Indian Penal Code, and acquit them. They should be released forthwith unless wanted in connexion with some other case.

Appeal allowed.

CIVIL MISCELLANEOUS

Before Mr. Justice Mukerji and Mr. Justice Tandon*

SARDAR IQBAL SINGH (PETITIONER).

v.

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January, 3

THE MUNICIPAL BOARD, LUCKNOW AND OTHERS
(OPPOSITE-PARTIES)

*Rickshaws, plying of—Lucknow Municipal Board—Lucknow
Bye-laws 2 and 4, scope of—"Plying for hire", meaning of.*

Held, that the Municipal Board, Lucknow, is directed to forbear from impounding rickshaws entering the Municipal limits while carrying passengers from Rup Pur Khadra, (a village situate on the borders of the Lucknow Municipality, close to Islamia College Hostel, Lucknow), to destinations within those limits, or while they are taking such passengers on their return trip.

Held, further that this will not affect the right of the Board to detain in accordance with the bye-laws any vehicle which may be found plying for hire within the Municipal limits.

Civil Miscellaneous Writ No. 180 of 1957.

The facts appear in the judgment.

B. K. Dhaon, for the applicant.

Niamatullah, B. L. Kaul and Ram Krishna, for the opposite parties.

The judgment of the Court was delivered by—

TANDON, J. :—This is a petition under Article 226 of the Constitution on behalf of one Sardar Iqbal Singh. The petitioner claims to possess seven licences granted to him by the Gram Sabha of village Rup Pur Khadra for plying of rickshaws on hire. Out of these licences, five bear nos. 22, 23, 25, 132 and 175. Village Rup Pur Khadra is admittedly situate on the borders of the Lucknow Municipality, very close to Islamia College Hostel, besides some other spots of the town of Lucknow. The said licences were, according to the petitioner, granted to him by the Gram Sabha of the said village in accordance with section 37 (d) (ii) of the U. P. Panchayat Raj Act, read with rules 222 and 223 of the

*Sitting at Lucknow.

Rules framed under that Act. His complaint was that the Municipal Board, Lucknow, through its servants, impounded the aforementioned five rickshaws on the 20th and 24th of August, 1957, while these were carrying passengers from Rup Pur Khadra to destinations within the Municipal limits of Lucknow. According to him the hiring of the rickshaws was done at Rup Pur Khadra.

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The Lucknow Municipal Board has, in pursuance of section 298 (2), List I-H (c) and (d), made several bye-laws for the regulation and control of rickshaws plying for hire or kept for private use within the Municipal limits of Lucknow. Bye-law 2 provides that no person shall ply for hire or use for private purposes a cycle or a hand-drawn rickshaw within the limits of the Lucknow Municipality except under a licence granted by the Executive Officer of the Board on payment of certain fees. Bye-law 4 provides that no person shall act as a driver or shall employ a driver unless he holds a valid licence granted by the Executive Officer on Form no. 12 on payment of a licence fee of Rs.3 per annum. Thus under bye-law 2, the Board issues licences for rickshaws, while under bye-law 4, the driver of a rickshaw had also to obtain a licence before he could drive it within the Municipal limits. Reference may also be made here to bye-law 20, which authorizes the Board's officials to require any rickshaw-driver committing a breach of the bye-laws to accompany him to the Municipal Officer for action to be taken against him, including suspension of his licence. Bye-law 22 says that where a licence is suspended, the licensee shall deliver the rickshaw to the Executive Officer or any officer appointed by the Board and thereupon such officer shall keep the vehicle during the period of suspension at such place as may, from time to time, be fixed by the Executive Officer and for which a fee at the rate of Re.1 per diem shall be chargeable.

The petitioner has by this petition challenged the right of the Board to impound rickshaws; his further

1958. contention was that he had a right to bring his rickshaws within the Municipal limits in the course of carrying and dropping at their destination the passengers who had boarded his rickshaws at Rup Pur Khadra. He claims that he has a constitutional right to pass and re-pass with his rickshaws through the public streets within the Lucknow Municipality and he relied for this on sub-clauses (d) and (g) of clause (1) of Article 19 of the Constitution. He further alleged that no less than 450 rickshaws, under licences issued by the Cantonment Board, Lucknow, had been allowed by the Municipal Board to pass and re-pass through the streets within the Lucknow Municipality without any hindrance or being subjected to impounding, so that its action in allowing rickshaws licensed by the Cantonment Board and not allowing rickshaws licensed by the Gram Sabha was discriminatory and, therefore, in contravention of Article 14 of the Constitution. The relief asked for by the petitioner was this :

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“A writ of mandamus and prohibition or such other writ or order may be issued against the Municipal Board, Lucknow, requiring it to forbear from impounding the rickshaws passing or re-passing the Municipal limits of Lucknow for the convenience of the residents belonging to the Gram Sabha Rup Pur Khadra and to release those already impounded by it.”

The petitioner further prayed for an *ad interim* injunction against the Board restraining it from impounding the rickshaws belonging to the petitioner, but we are no longer concerned with this relief.

The Board does not deny that the rickshaws in question were impounded. The contention of the Municipal Board, however, is that these and other rickshaws bearing licences granted by the Gram Sabha were found plying for hire within the Lucknow Municipal limits and it was on that account that they were impounded.

It appeared that in pursuance of a certain policy adopted by the Board, issue of fresh licences for new rickshaws had been stopped for some time by the Board. The Board fixed a maximum limit of 3,250 licences, which number had already been reached. The result was that new rickshaws could not be permitted to ply even if one was prepared to obtain a licence from the Board. Consequently it was alleged that the petitioner, and likewise some other persons, in order to get round the said decision of the Board, maliciously obtained licences in large numbers from Gram Sabha, Rup Pur Khadra, and have on their strength started playing for hire rickshaws within the Lucknow Municipality. It also was urged that Rup Pur Khadra had a population of about 500 persons only but licences for over 450 rickshaws has been granted by it, which fact showed that what otherwise appear to be an innocent act was actually a device to ply for hire rickshaws within the Lucknow Municipality without licences. For the above reasons the Board has contended that the Court should refuse to grant the writ prayed for.

The petition was filed against the Municipal Board alone. Subsequently, however, three persons, Man Singh, Gur Bachan Singh and Ram Narain Talwar, who are some of the licence-holders from the Board for plying rickshaws on hire within the Lucknow Municipal Board, applied to be made parties claiming that they were interested in the result of the petition. Their request was granted by an order, dated the 18th of September, 1957. They also have resisted the issue of any writ against the Board and put forward substantially the same pleas as did the Board. They also challenged the petitioner's right to pass and re-pass with his rickshaws within the Lucknow Municipality even for the purposes of carrying passengers from Rup Pur Khadra to destinations within the Lucknow Municipality and taking them back. They further contended that the Gram Sabha of Rup Pur Khadra had no authority to issue licences, nor could any rickshaw licenced by them enter the Municipal limits without obtaining licences from the Municipal Board. These interveners claimed

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that since the presence of these rickshaws adversely affected their trade, for which they have to pay heavy fees to the Municipal Board, they claimed the right to object to their plying within the Municipal limits.

It may be worthwhile to refer here to an application moved on behalf of the Board on the 21st of November, 1957, after the conclusion of the hearing. In this application the Board disowned ever having interfered with the entry of any vehicles, including rickshaws, carrying passengers from beyond Municipal limits or their going back, whether with or without passengers, and it was pointed out that the Board did not challenge the right of a citizen of the Union to enter, either on vehicles or otherwise, the Municipal limits and to go out of those limits or to pass through it. It, however, reiterated that the applicant's object in making this petition was that these vehicles, which he was actually keeping and plying for hire within the Municipal limits and for which he held no licences, might continue to do so under the pretext that they carried passengers from beyond the Municipal limits.

As the Board failed to take up the stand that has now been taken by it or to concede the right of the petitioner to bring his rickshaws within the Municipal limits, considerable time was spent in thrashing out this aspect of the case. It was not until the arguments had concluded that it conceded the petitioner's right in that behalf. And now that this right is no longer disputed, the relief asked by the petitioner must be granted and an order should issue against the Municipal Board, Lucknow, directing it to forbear from impounding the rickshaws passing or re-passing within the Municipal limits of Lucknow for the convenience of the residents belonging to the Gram Sabha, Rup Pur Khadra and boarding such rickshaws outside the Municipal limits of the Lucknow Municipality. Since the interveners did not concede the legal position, as did the Board, the exact legal position has to be determined. But before we did so, it might be worthwhile to refer to the affidavits filed

on behalf of the parties. The petitioner has, in paragraph 3 of his affidavit, dated the 27th August, 1957, said that the five out of the seven rickshaws, bearing nos. 22, 23, 25, 173 and 175, had crossed into the Municipal limits of Lucknow on the 20th and the 24th August, 1957, as these had been hired by passengers belonging to Rup Pur Khadra. His complaint accordingly was that the rickshaws were stopped and impounded by the Municipal authorities while they were carrying passengers who had boarded at Rup Pur Khadra for destinations within the Lucknow Municipal limits. This is affirmed once again in paragraph 4 of the same affidavit. The Board's allegation contained in its affidavit, dated the 17th September, 1957, on the contrary, is that these rickshaws were found plying within the Municipal limits of Lucknow and it was for that reason that they were impounded under bye-laws 20 to 22 of the bye-laws which had been framed for the regulation and control of rickshaws plying for hire or kept for private use within the limits of the Lucknow Municipality. In paragraph 8 of the affidavit the Board also alleged that these persons were actually plying their rickshaws for hire within the Lucknow Municipality under the pretext of carrying passengers from Rup Pur Khadra to Lucknow and back, and, in paragraph 9, that rickshaws holding licences from Gram Sabha, Rup Pur Khadra, were not entitled to ply within the Municipal limits of Lucknow, or enter those limits unless they were licensed by the Municipal Board.

Two questions thus emerge for consideration, first, whether the five rickshaws in question were carrying passengers from Rup Pur Khadra to destinations within the Lucknow Municipality, and, secondly, whether they were, in the absence of a licence from the Lucknow Municipality, entitled to enter the Municipal limits. On the second question there has been a concession by the Board by its application of the 21st November, 1957, wherein the right of the petitioner to enter the Municipal limits in the course of carrying passengers from Rup Pur Khadra to Lucknow was accepted. The only question which, therefore, remained, so far as the Board

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was concerned, was whether the vehicles were impounded because they had been plying for hire within the Municipal limits, or, were they merely carrying passengers from Rup Pur Khadra to destinations within the Lucknow Municipality.

As a rule, we do not enter into an investigation of disputed facts in these proceedings which are decided on the basis of affidavits. But it, nevertheless, is necessary for a decision of this case to find whether the rickshaws in question were plying for hire within the Municipal limits or not. In support of their contention the Board placed two further affidavits, one by Mujtaba Husain, the Inspector attached to the licensing office of the Board, and the other by Sri Hari Shanker Sharma, the licensing officer. The latter, while stating in paragraphs 20 and 21 of his affidavit, dated the 21st November, 1957, that rickshaws nos. 25 and 132 were detained at Lalbagh and Qaiserbagh on 20th August, 1957, and that rickshaws nos. 23 and 175 were detained at Nakhas and Qaiserbagh on 28th August, 1957, along with the affidavit, also filed the statements said to have been obtained by the Inspector concerned from the passengers, who were then seated in those vehicles. According to them, these passengers had hired the vehicles within Municipal limits for destinations within Municipal limits. It was urged that these statements were inadmissible in evidence and the Board ought to have filed affidavits of those persons, or should have put them in the witness-box. There is doubtless this difficulty in accepting these statements in the absence of the persons concerned not having been put forward. It is not possible to rely on them in proof of the truth of the facts stated in them. There are before us, the affidavits made by Mohan, Baqar Mirza, Adharey and Dulare, who were driving those vehicles at that time. According to them, the passengers had boarded the vehicles at Rup Pur Khadra for destinations within the Lucknow Municipality. In face of these affidavits it is not possible to hold that the vehicles in question were "plying for hire" within the Municipal limits at the time they were intercepted. There is on

behalf of the Board, therefore, no satisfactory proof that the passengers had boarded the impounded rickshaws within the Municipal limits or had hired them inside those limits. In these circumstances it has, in our opinion, to be assumed for the purposes of the decision of this petition that the rickshaws in question were carrying passengers from Rup Pur Khadra, though this question loses its importance because the impounded vehicles have already been released.

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Before we proceed to consider the main question urged in this case, we may briefly refer to the objection taken by the Board, namely, that the Gram Sabha, Rup Pur Khadra, had to legal authority to issue licences. In its opinion the law simply entitled the Gram Sabha to levy a tax on vehicles kept within its limits or plying for hire therein. It can issue no licences. A decision on this question, in our opinion, is not necessary for the decision of the present case, though we are disposed to think that section 37 (d) (ii) of the Panchayat Raj Act, read with rules 220 and 223, gave authority to the Gram Sabha to license in that manner the plying of rickshaws.

The contention put forward was whether the petitioner had or had not a licence, he certainly had the constitutional right to enter the territory of the Lucknow Municipality for the purpose of bringing passengers within that territory and even to take them back without the necessity of a license from the Municipal Board of Lucknow. The petitioner claims that right under Article 19 (i) (d) and (g) which guarantee to an Indian citizen the freedom of movement and the right to practise any profession, or to carry on any occupation, trade or business. His learned counsel urged that the petitioner had an unrestricted right of entry into the Municipality in the exercise of his right to carry on his trade and business as also in the exercise of the right of free movement throughout the territory of the Union. Article 304, which guarantees freedom of trade, commerce and intercourse, was not referred to, though it was perhaps more relevant. However, it would not

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be necessary to go into that question as in either event the right of the Board to stop the vehicles entering the Municipal limits from places beyond those limits can only be supported on the bye-laws framed by it. We, therefore, at once revert to them. Bye-law 2 required that no person shall ply for hire a cycle or hand-driven rickshaw within the limits of the Lucknow Municipality except under a licence granted by the Board. Bye-law 4 likewise said that no person shall act as a driver of any such rickshaw unless he holds a valid licence granted by the Board. The prohibition in these bye-laws, therefore, is against plying for hire of rickshaws within the Municipal limits of Lucknow. The portion of these bye-laws which applied to rickshaws kept for private purposes is not relevant here, as the petitioner's case, uncontroverted, has been that the rickshaws in question were licensed by the Gram Sabha, Rup Pur Khadra, and were kept there, but were detained in the course of their journeys from Rup Pur Khadra to destinations within the Lucknow Municipality. According to him, the hiring was done in each case at Rup Pur Khadra and they were used simply for carrying the passengers to their destinations in pursuance of the hiring done at Rup Pur Khadra. No hiring was done within the Municipal limits, though a portion of the journey was performed within those limits. What is necessary, therefore, is to ascertain the correct meaning of the expression "plying for hire", particularly as the Board urged that the carrying of passengers irrespective of whether the hiring was done outside the Municipal limits or within those limits amounted to "plying for hire" within the Municipal limits, if any part of the journey fell within those limits.

The above stand taken by the Board, in our view, cannot be sustained. "Plying for hire" means the act of waiting for and soliciting passengers. Therefore, no sooner a person has hired a vehicle the "plying for hire" of the vehicle is completed. As was observed by Lord TREVETTIN, C. J., in *Sales v. Lake* (1) :

(1) L.R. [1922] 1 K.B. 553.

"A carriage could not accurately be said to ply for hire unless two conditions were satisfied :

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- (1) There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them, and

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- (2) the owner or person in control who is engaged in or authorized the soliciting or waiting must be in the possession of a carriage for which he is soliciting or waiting to obtain passengers."

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There must, therefore, be soliciting or waiting to secure passengers before a vehicle can be said to ply for hire. The above view was endorsed in *Local Fund Overseer, Mayavaram* 1. *Pakkirisami* (1) also. There must, therefore, be a general invitation by the person in charge of the vehicle to the members of the public to make contracts with him for carriage in the vehicle and it is only at the place where such invitation is extended that the vehicle can be said to ply for hire. Merely carrying passengers to destinations at some place within the Municipal limits and, therefore, covering in the course of the journey some part of the Municipal limits will not be plying for hire within the Municipal limits. We are unable to accept the contention that carrying a passenger on any part of the Municipal road irrespective of where the hiring was done is plying for hire within the Municipal limits. Where, therefore, hiring is done outside the Municipal limits, even though a portion of the journey falls within Municipal limits, the vehicle cannot be said to be plying for hire within the Municipal limits. Such being the meaning of the expression "plying for hire", the bye-laws in question which regulate the plying of rickshaws for hire within the Municipal limits cannot hold good in the case of rickshaws which solicit or extend invitation to passengers beyond those limits. These bye-laws cannot affect or control the right of such other vehicles to enter the Municipal limits.

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The right of entry of such vehicles inside the Municipal limits belongs to the petitioner independently of these bye-laws and is not affected by them ; and if this is so, as we have no doubt it is, the Board cannot on the strength of the said bye-laws intercept or impound vehicles.

The petitioner relied on Article 14 also of the Constitution to challenge the action of the Municipal Board, because, according to him, the Board allowed rickshaws licensed by the Cantonment Board to enter and carry passengers within the Municipal limits, but did not do so in the case of rickshaws licensed by the Gram Sabha of Rup Pur Khadra. As the bye-laws stand, there is nothing in them to discriminate between rickshaws licensed by one or the other authority. There is, therefore, no substance in this plea.

Now that we find that the petitioner has a right to bring his rickshaws within the Municipal limits while carrying such passengers as hired them outside those limits, the question arises as to what relief may be granted to him. Now that the right to such entry is not disputed by the Board, ordinarily it should have been sufficient to affirm the right to such entry, even having regard to the allegations of the Board that there was an effect by such methods to introduce spurious vehicles for hiring purposes within the Municipal limits. Rup Pur Khadra has a population of about 500 persons only. Nevertheless 450 rickshaws have been licensed by that Gram Sabha. Neither the fact of Rup Pur Khadra being adjacent to Lucknow, nor the combined requirements of Rup Pur Khadra and the adjoining localities could justify such a large number of vehicles. The suspicion of the Board cannot be said to be wholly unjustified. But we cannot overlook the fact that the Municipal Board persisted, even up to the last stage of arguments, to dispute the right of the petitioner to enter the Municipal limits with passengers on his rickshaws though they were hired outside those limits for destination within those limits. We have, therefore, thought it necessary to make an order directing the Municipal Board, Lucknow, to

forbear from impounding rickshaws entering the Municipal limits while carrying passengers from Rup Pur Khadra to destinations within those limits, or while they were taking such passengers on their return trip. This will, however, not affect the right of the Board to detain in accordance with the bye-laws any vehicle which may be found plying for hire within the Municipal limits. We order accordingly.

The petitioner will get his costs from the opposite parties to be paid by them in equal proportion.

Petition allowed.

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*Before Mr. Justice Singh and Mr. Justice Bhargava**

BABU RAM UPADHYA (APPLICANT)

v.

THE UTTAR PRADESH GOVERNMENT
AND OTHERS
(OPPOSITE-PARTIES)

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January, 9

Dismissal—Sub-Inspector—Police Regulation, para. 486, sub-rule v. scope of —Writ petition, applicability of.

Mr. B. R. Upadhyia, a Sub-Inspector of Police, the applicant, met one Tika Ram who was carrying currency notes in a *potli*. The Sub-Inspector asked Tika Ram to produce the *potli* and he examined and counted the currency notes but they were returned to Tika Ram. Tika Ram on reaching home found that they were short by Rs.250. He made a complaint of the above facts to the Superintendent of Police on 9th September, 1953, and an inquiry was made by the Superintendent of Police and departmental proceedings under s. 7 of the Police Act were taken against the applicant who was dismissed. The applicant has filed this writ petition against the order of dismissal.

Held, that an offence under s. 409, Indian Penal Code, is admittedly a cognizable offence and as the complaint made by Tika Ram was in respect of a cognizable offence under s. 409, Indian Penal Code, the provisions of Police Regulation 486, sub-paragraph 1 applied to it. No case was registered by the police on the information received by the Superintendent of Police, nor was any report under s. 157, Criminal Procedure Code, submitted to the District Magistrate, or was accepted by

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him. Departmental action, as laid down in paragraph 490 could be taken only after the final report under s. 173, Criminal Procedure Code, had been accepted by the District Magistrate. No such report as mentioned above was made or accepted by the District Magistrate. An express provision laid down in paragraph 486 of the Police Regulation was ignored and the dismissal is illegal.

Mohd. Umar v. Inspector General of Police (1), Ayodhia Prasad v. State of Uttar Pradesh (2) relied on.

Held, further that the order of dismissal was passed as far back as the 19th of October, 1954, and this petition has been pending for over two years and possibly a suit would be time-barred and the relief in this writ petition should not be refused in the present case and the applicant should not be driven to the necessity of filing a regular suit after his petition has been pending for over two years in this Court.

Civil Miscellaneous Writ No. 115 of 1955.

The facts appear in the judgment.

Niamatullah and Harish Chandra for the applicant.

Standing Counsel for the opposite party.

The judgment of the Court was delivered by—

SINGH, J. :—This is a petition under Article 226 of the Constitution of India for the quashing of an order of dismissal passed by opposite party no. 2 and subsequently confirmed by opposite parties nos. 3 and 1.

It appears that the applicant was a Sub-Inspector of Police appointed in December, 1948; in June, 1953, he happened to be posted at Sitapur. On 6th September, 1953, the applicant was returning from a village known as Madhwapur where he had gone in connexion with the investigation of a theft case when he saw a person, who was subsequently found to be Tika Ram, coming from the side of a canal and going hurriedly towards a field. The movements of Tika Ram roused some suspicion in the mind of the applicant. One Lalji, an ex-patwari, also happened to be with the Sub-Inspector at that time. Tika Ram was called and it was found that he was carrying something in the folds of his *dhoti* which he was trying to hide with his hand. The applicant

(1) 1957 A.L.J. 603. (2) Civil Misc. Application (O.J.) No. 86 of 1954, decided on 23rd December, 1957.

asked him to produce the *potli* which Tika Ram had and on examination it was found to contain currency notes. They were examined by the applicant and were counted by him and Lalji the ex-patwari. The notes were subsequently returned by Lalji to Tika Ram. Tika Ram went away and when he counted the currency notes at his house he found that they were short by Rs.250. He then made a complaint to the Superintendent of Police on 9th September, 1953, in which he narrated the above facts. An inquiry was then made by the Superintendent of Police and ultimately departmental proceedings under section 7 of the Police Act were taken against the applicant. These proceedings resulted in the dismissal of the applicant and he has, therefore, come up to this Court with this petition for the issue of a writ.

The first point on which the order of dismissal has been attacked by the applicant is that the provisions of paragraph 486 of the Police Regulations had not been observed and as such the proceedings taken under section 7 of the Police Act were invalid and illegal. Paragraph 486 lays down the procedure and the conditions for departmental trial under section 7 of the Police Act. It is expressly provided that every information received by the Police relating to the commission of a cognizable offence by a police officer shall be dealt with in the first place under Chapter XIV, Criminal Procedure Code, according to law, and a case under the appropriate section will be registered in the police station concerned. There is a proviso attached to sub-paragraph I of paragraph 486 which lays down certain exceptions. One of the exceptions is that no case will be registered by the police, if the information is received, in the first instance, by a Magistrate and forwarded by the District Magistrate to the Police. The proviso, however, does not apply to the facts of the present case inasmuch as there is no allegation that the information, which was conveyed to the Superintendent of Police by means of the application made by Tika Ram, was given to a Magistrate in the first instance. The other point, which is material, is whether the information was in respect of a cognizable

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offence. Tika Ram had in his application made to the Superintendent of Police clearly mentioned that he had in his possession currency notes of the value of Rs.650 and the *potli* containing these notes was given to the Sub-Inspector when he wanted to search and that the currency notes were returned to him after examination. The Sub-Inspector evidently never meant to take away the money but he wanted to examine the contents of the *potli* as Tika Ram was found to be behaving in a suspicious manner.

It has been contended on behalf of the opposite parties that the misappropriation of a part of the money amounted in the present case, if at all, to an offence under section 403 of the Indian Penal Code, which is not a cognizable offence. The contention on behalf of the applicant, however, is that the misappropriation of the money under the circumstances mentioned above amounted to an offence under section 409, Indian Penal Code. The main ground on which it has been contended on behalf of the opposite parties that the case fell under section 403, Indian Penal Code, is that there was no entrustment made by Tika Ram in favour of the applicant. Some reported cases have also been cited on behalf of the opposite parties, but it is not necessary to refer to all those cases as in everyone of those cases the property in the movables made over or taken away by the accused ceased to vest in the person who parted with the property. In *Chelloor Mankkal Narayan Ittiravi Nambudiri v. State of Travancore Cochin* (1) a person gave a certain sum of money as illegal gratification to another person. As soon as the money was given, it ceased to remain the property of the person who gave it and, therefore, there was no question of an entrustment. In *Emperor v. Ghanshamdas* (2) a certain sum of money was given to a contractor for doing a certain act. In this case also the movable property ceased to be the property of the person who parted with it. There can be no doubt that there should be some entrustment of property or dominion over property in order to constitute an offence under section 409, Indian Penal Code,

(1) A.I.R. 1953 S.C. 478.

2. A.I.R. 1928 Sind, 106.

but it is not necessary that this entrustment should be attended by all legal formalities required for the creation of a trust. If the parties or at least the person who takes away the property does not intend to take away the property as his own or for his own benefit but takes it away with the intention that it will continue to be the property of the person from whose possession it has been taken, this conduct will evidently create an entrustment and if the person so taking away the property subsequently converts it to his own use, it will be a case of criminal breach of trust and not of criminal misappropriation. We are unable, therefore, to agree with the contention raised on behalf of the opposite parties that the complaint made by Tika Ram to the Superintendent of Police amounted only to an offence under section 403, Indian Penal Code, and not to an offence under section 409, Indian Penal Code. An offence under section 409, Indian Penal Code, is admittedly a cognizable offence and as the complaint made by Tika Ram was in respect of a cognizable offence, the provisions of Police Regulation 486, sub-paragraph I applied to it. It is not disputed that on the information received by the Superintendent of Police no case was registered by the Police, nor was any report under section 157, Criminal Procedure Code, submitted to the District Magistrate, or was accepted by him. The procedure provided for in paragraph 486 of the Police Regulations clearly required the Superintendent of Police to register a case in the police station and to follow the procedure laid down in section 173, Criminal Procedure Code, if there was no sufficient evidence in support of the complaint. Departmental action as laid down in paragraph 490 could be taken only after the final report under section 173, Criminal Procedure Code, had been accepted by the District Magistrate. No such report as mentioned above was made or accepted by the District Magistrate, Paragraph 493 of the Police Regulations is as follows :

“It will not be permissible for the Superintendent of Police in the course of a departmental proceeding against a police officer who has been tried judicially to re-examine the

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truth of any facts in issue at his judicial trial and the finding of the court on these facts must be taken as final."

This provision clearly indicates that the Superintendent of Police was bound to accept a finding on facts in issue arrived at a judicial trial. There having been no judicial trial, the applicant was deprived of his right to establish the question of fact in his favour at a judicial trial before a court of law. There is, therefore, no doubt that the express provision laid down in paragraph 486 of the Police Regulations was ignored in the case of the applicant.

It has further been contended on behalf of the opposite parties that the Police Regulations are only rules of conduct laid down by the Inspector General of Police with the approval of the State Government and reliance has been placed on certain observations in *Niranjan Singh v. The State of Uttar Pradesh* (1). It has been observed by their Lordships of the Supreme Court that the U. P. Police Regulations contain rules which are statutory as also rules which have no force of law and are only for the guidance of the officers and that an indication as to whether a particular rule has been framed under the provision of some law has been given in the Regulations themselves. Paragraph 486 finds a place in Chapter XXXII of the Police Regulations and paragraph 477 with which the Chapter starts indicates that the rules in Chapter XXXII have been made under section 7 of the Police Act and apply only to officers appointed under section 2 of the Police Act, (Act no. V of 1861). In view of the indication given in paragraph 477 of the Police Regulations, the rules embodied in Chapter XXXII have been framed under section 7 of the Police Act and have the force of law and are not only directory or administrative. The Superintendent of Police who conducted the departmental trial did not observe the provisions of paragraph 486 of the Police Regulations which have the force of law and as such a dismissal as a result of such departmental proceedings would be illegal. This view finds supports in two Bench cases of this Court. One of them, which has not

yet been reported and to which one of us was a party. It is *Ayodhia Prasad v. State of Uttar Pradesh* (1). The other case is *Sri Mohd. Umar v. Inspector General of Police* (2). In view of the fact that the departmental trial under section 7 of the Police Act which resulted in the dismissal of the applicant was illegal, the order of dismissal cannot stand and must be quashed. In view of this finding it is not necessary to enter into the other grounds taken up in the writ petition.

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While the judgment was being dictated the learned standing counsel drew our attention to a very recent case reported in *Union of India v. T. R. Varma* (3) in which an observation has been made that a person, whose services have been wrongfully terminated, is entitled to institute an action to vindicate his rights and this circumstance should be taken into consideration while considering a petition for writ. Though their Lordships of the Supreme Court has made the above observation, yet they felt pressed by the fact that the order dismissing the respondent in that case having been made on 16th September, 1954, an action to set aside that order would have been time-barred, and, therefore, they entered into the merits of the case. In the present case also, the order of dismissal was passed as far back as the 19th of October, 1954 and this petition has been pending for over two years and possibly a suit by the petitioner would be time-barred and, therefore, we do not think that the relief should be refused to the petitioner in the present case and that he should be driven to the necessity of filing a regular suit after his petition has been pending for over two years in this Court.

As a result, the petition is allowed and the order of dismissal passed on 19th October, 1954, and confirmed by the Inspector General of Police in appeal on 28th February, 1955, and against which a revision was dismissed by opposite party no. 1 in September, 1955, is, therefore, quashed. The petitioner shall get his costs from the opposite parties. *Petition allowed.*

1. Civil Misc. Application (O. J.) No. 86 of 1954. decided on 23rd December, 1957.

2. 1957 A.L.J. 603.

3. A.I.R. 1957 S.C. 882.

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December, 15

APPELLATE CRIMINAL

*Before Mr. Justice Gurtu, on a difference of opinion
between Mr. Justice Roy and Mr. Justice Mulla*

GOKUL

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*Criminal Procedure Code, 1898, ss. 419, 420—Appeal filed
from jail—Second appeal filed through counsel—No bar—
Practice—Procedure to be followed.*

A convict presenting a jail appeal first is not debarred from presenting a represented appeal also within limitation. As soon as a represented appeal is presented, it can be connected with jail appeal and both can be listed together. The appellant would then be entitled to withdraw his jail appeal and to proceed with represented appeal.

In case a jail appeal is summarily, finally and unconditionally dismissed, the position is different.

Case-law discussed.

Criminal Appeal No. 441 of 1955, from an order of Onkar Singh, Sessions Judge of Pilibhit, dated 14th January, 1955.

The facts appear in the judgments.

Yashoda Nandan for the appellant.

The Advocate General (*K. L. Misra*) for the State.

MULLA, J.:—Gokul appellant, who has been convicted under section 395, Indian Penal Code, has filed this appeal through a counsel. Earlier Gokul filed an appeal from jail, which was dismissed by a learned Judge of this Court on some date before the 22nd of March, 1955. The order passed by the learned Judge is on a printed form and does not bear any date. On the other hand the file indicates that this order was passed on the 30th of March, 1955. It seems to me that there are certain High Court rules under which the office thinks that the date of the delivery of judgment is that date on which the High Court seal is affixed to the judgment.

After the summary rejection of his first appeal, Gokul filed the present appeal which came before another Judge of this Court on the 29th of March, 1955. This appeal was presented before the Registrar on the 19th of March, 1955, and it seems that it was presented in the office some days earlier, because a notice to the Government Advocate was given on the 16th of March, 1955, in connexion with the bail application moved on behalf of the appellant. When this appeal came up before the second Judge on the 29th of March, 1955, he was informed that the previous appeal filed by the appellant has been summarily rejected. The learned Judge, however, admitted this appeal and directed that it should be heard on merits. It has now come up for disposal before me.

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The facts given above raise several important points of law. The following questions have to be decided in this appeal :

- (1) Is the proviso to section 421, Criminal Procedure Code, which makes a distinction between appeals filed under section 419, Criminal Procedure Code, and section 420, Criminal Procedure Code, justifiable, or whether it violates Article 14 of the Constitution of India, as it lays a basis for discrimination which is neither reasonable nor compatible with the principles of justice ?
- (2) Has the High Court any powers to admit and hear a second appeal filed through a counsel after the first appeal filed by the prisoner from jail has been summarily rejected under the proviso quoted above ?
- (3) Can it be said that the judgment of the High Court is not delivered until the seal of the High Court is affixed to such a judgment ?
- (4) Can the High Court review its own judgment under section 56-A Cr. P. C.

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As these points are likely to crop up in other cases also, I think it desirable that an authoritative decision should be given by this Court. I, therefore, direct that this appeal should be placed before the Hon'ble the CHIEF JUSTICE for constituting a Divisional Bench before whom this appeal should be laid for disposal. If possible, such a Bench may be constituted at an early date.

ROY, J.:—This appeal has been referred to a Bench because of certain important questions of law which arise for consideration.

The facts are these. Appellant Gokul was convicted on the 14th of January, 1955, by the Additional Sessions Judge of Pilibhit under section 395, Indian Penal Code, and was sentenced to five years' rigorous imprisonment. He submitted an appeal from jail on the 14th of February, 1955. On the 14th of March, 1955, office reported that there was no previous petition of appeal. The jail appeal was submitted to Hon'ble BEG, J., and he dismissed it summarily on some date prior to 22nd March, 1955. The judgment of dismissal containing the single word "Dismissed" was sealed with the seal of the Court on 30th March, 1955. On 17th March, 1955, Gokul had presented another appeal, (namely, the present one), through a counsel and report was made upon the memorandum of appeal on the same date to the effect that the earlier jail appeal had been submitted to an Hon'ble Judge for admission which had not been received back with orders and that the represented appeal which was an appeal for the second time was within limitation. When this memorandum of appeal with the report aforesaid was presented before the Registrar on the 19th of March, 1955, he directed that it should be laid before the Court for orders on 22nd March, 1955. On the 22nd of March, 1955, there was a further report on the memorandum of appeal to the effect that the jail appeal had already been dismissed by Hon'ble BEG, J. The represented appeal came up before Hon'ble JAMES, J., for admission and he passed the following order on March 29, 1955 :

"Appellant's learned counsel states that the appellant's appeal from jail was previously

dismissed summarily. A regular appeal has now been filed. It is hereby admitted and will be heard on merits in due course. There is also a prayer for bail, but, in view of the evidence of identification against the appellant, bail cannot be allowed for the pendency of the appeal."

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The appeal came up for hearing before my brother MULLA, J., who referred it on 23rd October, 1956, to a Division Bench because of the following important questions of law which arise for determination:

- (1) Is the proviso to section 421, Criminal Procedure Code, which makes a distinction between appeals filed under section 419, Criminal Procedure Code, and section 420, Criminal Procedure Code, justifiable, or whether it violates Article 14 of the Constitution of India as it lays a basis for discrimination which is neither reasonable nor compatible with the principles of justice?
- (2) Has the High Court any powers to admit and hear a second appeal filed through a counsel after the first appeal filed by the prisoner from jail has been summarily rejected under the proviso quoted above?
- (3) Can it be said that the judgment of the High Court is not delivered until the seal of the High Court is affixed to such a judgment? and
- (4) Can the High Court review its own judgment under section 561-A, Criminal Procedure Code?

In order to determine these questions I shall briefly refer to certain relevant provisions of the Code of Criminal Procedure and of the Rules of the Court as also to the Constitution of India.

Section 410 of the Code of Criminal Procedure says that any person convicted on a trial by a Sessions Judge

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or an Additional Sessions Judge may appeal to the High Court. Section 419 of the Code says that every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader and every such petition shall, (unless the court to which it is presented otherwise directs), be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of charge recorded under section 367. Section 420 of the Code then provides that if the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail who shall thereupon forward such petition and copies to the proper appellate court. Rule 11 of Chapter XVIII of the Rules of the Court, 1952, enables such an accused to pray for his personal attendance in order to lay his view-point before the Court. The rule says that where the accused is in custody, his personal attendance shall not be required unless so ordered by the Court and a prayer for the personal attendance of the accused in Court shall not ordinarily be entertained if not made in sufficient time before the date of hearing to enable arrangements to be made with the officer in charge of the jail in which the accused is confined for his attendance in Court. In the present case no prayer for appearance in Court had been made by the appellant in his jail appeal.

Section 421 of the Code of Criminal Procedure provides for summary dismissal of appeal made either under section 419 or under section 420. Section 421 says that on receiving the petition and copy under section 419 or section 420 the appellate court shall peruse the same, and if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily, provided that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity to be heard in support of the same. Rule 14 of Chapter XVIII of the Rules of Court, 1952, lays down that jail appeals shall be submitted to a Judge for orders after the expiry of the period of limitation. These provisions make it absolutely clear that a prisoner who has preferred his appeal from jail

has the same equality before the law and has equal protection of the laws as a prisoner who has preferred his appeal through a counsel and is represented by counsel. The proviso to section 421 does not in my opinion violate Article 14 of the Constitution of India. Article 14 says that the State shall not deny to any person equality before the law or the equal protection of the law within the territory of India. The two expressions "equality before the law" and "equal protection of the law" may seem to be identical, but in fact they mean different things. "Equality before the law" is an expression of English common law and means that amongst equals the law should be equal and should be equally administered and that like should be treated alike. It does not mean an absolute equality of men which is a physical impossibility, but the denial of any special privilege by reason of birth, creed or the like in favour of any individual and also the equal subjection of all individuals and classes to the ordinary law of the land administered by the ordinary law courts. While "equality before the law" is a somewhat negative concept implying the absence of any special privilege in favour of any individual and the equal subjection of all classes to the ordinary law, "equal protection of the laws" is a more positive concept implying equality of treatment in equal circumstances. (See Dicey, Law of Constitution, 1939, page 47.) Judged by these standards the proviso to section 421 of the Code of Criminal Procedure in the light of the circumstances aforesaid creates no real distinction between appeals received from jail and appeals presented in court by the appellant personally or through his counsel. The distinction which is sought to be made out by the proviso to section 421 is unreal because in effect the same facilities are given to the appellants in both categories of appeals. In jail appeals the appellant, either on account of poverty and, therefore, unable to engage a counsel, or on account of any other cause, has the opportunity to pray for personal representation to lay his view-point before the court and if he does not avail of that opportunity by making a specific prayer to that effect, he cannot later on be heard to say that the proviso to section 421

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In recent times it has been realized that there cannot be any real equality in the "right to sue and be sued" unless legal advice is available to the poorer people in the same manner as to others whether in civil or criminal proceedings. For, without free advice, there is a virtual denial of equal justice to the poor man. In England the Poor Prisoners Defence Act, 1930, provides for the grant of free legal aid to a poor person upon a certificate by the court that his means are insufficient to obtain legal aid. This privilege has been extended by the Legal Aid and Advice Act, 1949, which has established a fund out of which legal aid will be provided to persons having income below a given minimum, whether in civil or in criminal cases. In U. S. A. though there is no express provision in the Constitution requiring offer of free legal aid to an accused, the right has to be deduced, so far as capital cases are concerned, from the right conferred by the Sixth Amendment of the Constitution "to have the assistance of counsel for defence". It has been held that in capital cases "due process requires that where the accused is unable to employ counsel because of his youth, ignorance or similar other reasons, the trial court must appoint a counsel to defend him : *Powell v. Alabama* (1), and this duty of the court is not discharged unless the counsel is appointed in time to enable him to give effective aid in the preparation of the defence : *Avery v. Alabama* (2). In India there is neither any constitutional nor statutory requirement to provide legal aid to an accused at the cost of the State. Of course, section 340 (1) of the Code of Criminal Procedure provides that an accused has the right to be defended at the trial by a lawyer.

"Any person accused of an offence before a criminal court, or against whom proceedings are instituted under this Code in any such court may of right be defended by a pleader."

(1) (1932) 287 U. S. 45.

(2) (1940) 308 U. S. 444.

The right to consult and to be defended by a legal practitioner of accused's choice is now recognized by Article 22 (1) of the Constitution of India, but the right in section 340 (1) does not extend to be provided with a lawyer by the State. It has been held by the Supreme Court in *Janardan Reddy v. State of Hyderabad* (1) that the American rule enunciated in the case of *Powell v. Alabama* (2), which is founded on the doctrine of Due process, does not extend to India and in India there is no absolute right to be provided with a lawyer by the State.

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In *Tara Singh v. The State* (3) it has been held:

"The right conferred by section 340 (1) does not extend to a right in an accused person to be provided with a lawyer by the State or by the police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one or to engage one himself or get his relations engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity."

The Rules of the High Court, however, lay down that where in capital cases the accused has no means to defend himself, a counsel should be provided to defend him. This is, however, not a statutory requirement and the Supreme Court has held in *Janardan Reddy v. State of Hyderabad* (1) that, read with section 340 (1) of the Criminal Procedure Code, the position at law is :

- (a) that it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented, the trial would be vitiated ;
- (b) but that a court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial ; and

(1) 1951 S.C.R. 344.

(2) (1932) 287 U.S. 45.

(3) 1951 S.C.R. 729.

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(c) that where there was no question of want of means on the part of the accused and the accused did not avail of the opportunity of engaging lawyers, the trial was not vitiated on the ground that the accused were not represented by lawyers at the trial.

In *Cowper v. Wadsworth Board* (1) it was observed that the party shall be heard, yet justice on the common law will supply the omission of the legislature. It is based upon the maxim "*audi alteram partem*"—hear the other side. It does not, however, necessarily mean that he is entitled to appear in person and to be heard orally, unless, of course, there is any statutory obligation to that effect. See *Board of Education v. Rice* (2) and *Local Government Board v. Alridge* (3). Even in the U. S. A. it has been held that though "due process" requires an "adequate notice" and a "fair hearing", the right of oral hearing varies from case to case, and unless the statute itself requires it, it is left to authority to determine whether to allow or deny oral argument. [See *F. C. C. v. W. J. R.*, (4)].

As our Supreme Court observes in *Gopalan v. The State* (5):

"I am not prepared to accept the contention that a right to be heard orally is an essential right of procedure even according to the rules of natural justice; The right to make a defence may be admitted, but there is nothing to support the contention that an oral interview is compulsory."

It follows that there is no natural right to be represented by a lawyer. The right must be derived from some provision of the Constitution, [e.g., Article 22 (1)], or of a statute. Hence it has been held in certain cases that where a statute provides that no lawyer shall be allowed to appear before a tribunal created by it, there is no denial of justice to the litigant. Again, the rule in section 340 (1) of the Code of Criminal Procedure does not guarantee any right of appeal from the decision

¹(1863) 14 C.E. (N.S.) 180.

(2) L. R. [1911] A.C. 179.

(3) L. R. [1915] A.C. 120.

(4) (1948) 337 U.S. 265 [276].

(5) 1950 S.C.R. 88, 124.

of the tribunal ; nor does it guarantee that any person convicted of an offence may on appeal be represented by a pleader.

Upon a consideration of the provisions noticed above my answer to the first question, therefore, is that the proviso to section 421 of the Code of Criminal Procedure is justifiable in the light of the circumstances mentioned above and it does not offend against Article 14 of the Constitution of India.

This brings me to a consideration of the other questions formulated above. A summary dismissal of an appeal involves an adjudication just as a dismissal after a full hearing. "Summarily" ordinarily means in an informal manner without the delay of formal proceedings. It does not mean "arbitrarily" or "lightly, without due consideration". The petition and judgment have to be read, the record may also be sent for, and, (in the case of appeal under section 419), the appellant or his pleader must be heard. These provisions unmistakably indicate that proper judicial consideration must be given to the subject matter of appeal, although it may not be necessary to write a judgment or give reasons. Reference in this connexion may be made to the following decided cases : *Rash Behari Das v. Balgopal Singh* (1), *Nitya Pal v. Beni Madhab Ghose* (2), *Kalu Chand v. Tatu Shaik* (3), *Queen Empress v. Warubai* (4), *King Emperor v. Krishnayya* (5), *Nazar Mohammad Khan v. Hara Singh Bedi* (6).

In certain cases, however, it has been held that reasons for dismissal should be recorded briefly. These cases are: *Queen Empress v. Ram Narain* (7) *Queen Empress v. Nanhu* (8), *Emperor v. Kundan* (9), *Amanat Sardar v. N. Biswas* (10), *Ekcawrie Mukerjee v. Emperor* (11), *Abdul Latif v. Ahmad* (12), *Jag Narain v. Ghinhu* (13) and *Chhattu Gope v. Emperor* (14).

(1) (1894) I.L.R. 21 Cal. 92.

(3) A.I.R. 1929 Cal. 773.

(5) (1902) I.L.R. 25, Mad. 534.

(7) (1886) I.L.R. 8 All. 514.

(9) (1914) I.L.R. 36, All. 496.

(11) (?) I.L.R. 32 Cal. 178.

(13) A.I.R. 1935 Pat. 32.

(2) (1904-05) 9 C.W.N. 623.

(4) (1896) I.L.R. 20 Bom. 540.

(6) A.I.R. 1926 Lah. 196.

(8) (1895) I.L.R., 17, All. 241.

(10) (1911) I.L.R. 38 Cal. 307.

(12) (1932-33) 37 C.W.N. 235.

(14) A.I.R. 1938, Pat. 176.

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Giving reasons would also apply to High Courts, as the Supreme Court has held in *Mushtaq* (1) that if no indication of the views of the High Court is given in summary rejection order in cases which raise arguable issues, the Supreme Court feels embarrassed in dealing with applications for special leave. Summary rejection of appeal which raises issues of substance and importance was again disapproved by the Supreme Court in *Ramayya v. State of Bombay* (2). The proviso to section 421, Criminal Procedure Code, does not apply to jail appeals and so a jail appeal can be summarily dismissed on perusal of the judgment and the petition of appeal without notice to appear. The order of dismissal is final and it cannot be reviewed. In this connexion reference may be made to the following cases: *Queen Empress v. Bhimappa Bin Ramanna* (3), *Dahu Raut v. Emperor* (4), *Raju v. The Crown* (5) and *Shahu v. Emperor* (6).

Section 369 of the Code of Criminal Procedure says that once a judgment has been *signed*, no court can alter or review it, (save as provided by any law), except to correct clerical error, and in the case of a High Court such power as it may have under the Letters Patent is preserved by the section. It does not confer on the High Court any power to alter or review the judgment. The rule, therefore, is that if a judgment is once signed, no court can revise or alter it, even if any illegality is discovered. Such illegality or omission on the part of a lower court may, however, be brought to the notice of the High Court in its revisional jurisdiction for necessary action. The finality in section 369 is only in relation to the court which pronounces the judgment. If an erroneous order or illegal order is passed by the High Court, the only remedy is to move the Government under Chapter XXIX of the Code of Criminal Procedure. In this connexion reference may be made to *Dahu Raut v. Emperor* (4) and *Kunji Lal v. Emperor* (7).

(1) 1953 S.C.R. 809.

(3) (1895) I.L.R. 19, Bom. 732.

(5) (1929) I.L.R. 10, Lah. 1.

(2) A.I.R. 1955 S.C. 287.

(4) (1934) I.L.R. 61, Cal. 155.

(6) A.I.R. 1935 Sind. 84.

(7) (1936) I.L.R. 56 All. 990.

Practically all the High Courts are unanimous in the view that no criminal court has any power to add to or to alter or review its judgment after it is signed. Reference in this behalf may be made to the following cases: *Surendra Nath Banerjee* (1), *Queen Empress v. Chhat-tar Singh* (2), *Q. Ali v. Aziz Uddin* (3), *Jhari Lal v. King Emperor* (4), *Emperor v. Mari Parsu* (5), *Emperor v. Kale* (6), *Narain v. Chandrabhaga* (7).

Section 369 of the Code of Criminal Procedure as amended by Act XVIII of 1923 has effected no change and as before the High Court has no power to alter or review its own judgment once it has been pronounced and signed. In this connexion reference may be made to the following decisions of this Court and of other courts: *Queen Empress v. Durga Charan* (8), *Gobind Sahai v. Emperor* (9), *In re Gibbons* (10), *Queen Empress v. C. P. Fox* (11), *Rajjab Ali v. Emperor* (12), *In re Kunhammad Haji* (13), *In re Arumugh Padayachi* (14), *Kunji Lal v. Emperor* (15), *Jodha v. King Emperor* (16), and *Mohammad Mushtaqin v. Sukhraj* (17), except when it was passed without jurisdiction or on default of appearance without adjudication on merits or to correct a clerical error as held in *Raju v. Emperor* (18), *Few v. King Emperor* (19), *Kunhammad Haji v. King Emperor* (13) and *Diwan Singh v. Emperor* (20).

Section 561-A of the Code of Criminal Procedure was added by the Amending Act, (no. XVII of 1923), and it corresponds to section 151 of the Code of Civil Procedure (1908) and proceeds on the same principle. A procedural Code, however exhaustive, cannot expressly provide for all time to come against all the cases that may possibly arise and in order that justice may not be denied it is necessary that every court must in proper

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| (1) (1905-06) 10 C.W.N., 1062. | (2) (1880) I.L.R. 2 All. 33. |
| (3) 1893 A.W.N. 16. | (4) (1929) I.L.R. 8, Pat. 904. |
| (5) (1918) I. L. R. 42, Bom. 202. | (6) (1923) I.L.R. 45 All. 143. |
| (7) (1925) 26 Cr. L.J. 1289. | (8) (1885) I.L.R. 7, All. 672. |
| (9) (1916) I.L.R. 38 All. 134. | (10) (1887) I.L.R. 14, Cal. 42. |
| (11) (1886) I.L.R. 10, Bom. 176. | (12) (1919) I.L.R. 46, Cal. 60. |
| (13) (1923) I.L.R. 46, Mad. 382. | (14) A.I.R. 1926, Mad. 420. |
| (15) (1934) I. L. R. 56 All. 990. | (16) A. I. R. 1940 Oudh. 369. |
| (17) (1945) 46 Cr. L.J. 684. | (18) (1928) 29 Cr. L. J. 669. |
| (19) (1939) 40 Cr. L. J. 763. | (20) A.I.R. 1936, Nag. 132. |

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cases exercise its inherent power for the ends of justice or for the purpose of carrying out the provisions in the Code. It is an age-old and well-established principle that every court has inherent power to act *ex-debito justitiae* to do that real and substantial justice for the administration of which alone it exists, or to prevent an abuse of the process of the court. The section, however, gives no new powers. It only provides that those which the Court already inherently possessed shall be preserved, and is inserted lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Code and that no inherent power has survived the passing of that Act. The terms of section 561-A are wide, but at the same time it must be clearly understood that they do not extend the jurisdiction of the High Court to matters which are not inherently within the jurisdiction. Nor can any court claim inherent jurisdiction to exercise powers taken away by legislation. Section 561-A, therefore, does not modify section 369 of the Code or clothe the High Court with any fresh power to reconsider or review. The decision of this Court in *Banwari Lal's case* (1) is a decision to the point.

The question whether the High Court has powers to admit and hear a second appeal filed through a counsel after the first appeal filed by the prisoner from jail has been summarily rejected has been the subject of decision of this Court and of certain other courts, and it has been consistently held that after an appeal sent from jail has been disposed of, no second petition through counsel can be entertained or heard. Reference may be made to the following cases: *Emperor v. Khayali* (2), *Queen Empress v. Bhimappa Bin Ramanna* (3), *Ram Autar v. King Emperor* (4), *Gayadin v. Emperor* (5), *Pem Mahaton v. King Emperor* (6), *Ramjas v. Emperor* (7), *Raj Kumari v. Emperor* (8), *Jodha v. Emperor* (9) and *In re Appadu* (10).

(1) (1935) I.L.R. 57, All. 867.

(3) (1895) I.L.R. 19, Bom. 732.

(5) (1922) 23 Cr. L. J. 149.

(7) (1936) 37 Cr. L. J. 362.

(9) A.I.R. 1940 Oudh 369.

(2) (1922) I.L.R. 44, All. 759.

(4) A.I.R. 1924, Oudh, 425.

(6) (1935) I.L.R. 14, Pat. 392.

(8) A.I.R. 1940, Oudh. 371.

(10) A.I.R. 1947, Mad. 243.

There are two cases on this point which seem to have struck a different note. The one is in *Lachhman v. Emperor* (1) and the other is in *Emperor v. Bhawani Dihal* (2), in which it was held that the dismissal of the jail appeal must be deemed to be a provisional dismissal in no way affecting the right of the appellant to have his counsel heard under the proviso to section 421, Criminal Procedure Code, in connexion with the appeal filed under section 419, Criminal Procedure Code. In *Lachhman Chamar v. Emperor* (1) a learned Judge of this Court went on to refer to the practice with regard to the sealing of the order on jail appeal in the High Court and he remarked:

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“The practice in the High Court is that a summary dismissal of a jail appeal by a learned Judge does not in any way debar the hearing of an appeal filed by counsel. Indeed, the fixing of the seal is delayed till the period of limitation is over.”

These observations came to be considered by a Division Bench of the Oudh Chief Court in *Jodha v. Emperor* (3), cited above, in which there was a disagreement with the view quoted above and the dismissal of a jail appeal was held not to be a provisional dismissal in no way affecting the right of the appellant to have his counsel heard under the proviso to section 421 on an appeal filed under section 419 subsequent to the summary dismissal of the appeal filed under the provisions of section 420, Criminal Procedure Code. In *Emperor v. Khayali* (4) cited above, a Bench of this Court held that where a petition of appeal submitted through the Superintendent of the jail in which the appellant is confined has been considered and rejected by a Judge of the High Court, it is not open to the appellant to present through counsel thereafter a second petition of appeal.

In the light of the above current of decisions there is no room for doubt that—

(1) a represented appeal under the provisions of section 419 is not maintainable after a

(1) A.I.R. 1934, All. 988.

(2) 1906 A.W.N. 903.

(3) A.I.R. 1940, Oudh. 369.

(4) () I.L.R. 44, All. 759.

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jail appeal filed under the provisions of section 420 has been summarily dismissed under the provisions of section 421 of the Code of Criminal Procedure ; and

- (2) that the High Court has not and never has had any inherent power to review its own judgment and that section 561-A, Criminal Procedure Code, does not confer on it any power so to do.

The sealing of a judgment or order with the Seal of the Court may be traced to rule 83 of the Rules of the High Court of Judicature for the North-Western Provinces of the 18th of January, 1898, published under the authority of the Court in 1905 which was as follows :

“When a written judgment has been delivered, and when a judgment or order recorded by a judgment clerk has been signed by the Judge or Judges, who delivered or passed it, after inspection, supervision and correction, the Bench Reader shall seal such judgment or order with the seal of the Court.”

The Revised Rules published in 1937 contained an identical provision in rule 8 of Chapter VII. The corresponding rule under the Rules of the Court 1952, is to be found in rule 4 of Chapter VII which is as follows :

- “4. (1) When the transcript of the judgment or order prepared by the judgment clerk has been filed with the paper-book of the case, the Bench Reader shall submit it to the Judge or Judges who delivered it. It shall then be signed or initialled by such Judge or Judges after such corrections as may be considered necessary. Thereafter it shall be sealed with the seal of the Court by the Bench Reader.
- (2) Where the Judge or any of the Judges by whom the judgment or order was delivered is not available on account of death, the ill-

retirement or any other cause, the transcript shall be submitted to the Chief Justice, and it may be sealed under his orders without the signature of such Judge, an endorsement to that effect being made on such judgment or order under the signature of the Registrar:

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- (3) Where a written judgment or order is delivered it shall, after it has been signed or initialled by the Judge or Judges delivering it, be sealed with the seal of the Court by the Bench Reader."

Rule 83 aforesaid of 1898 came to be considered by a Division Bench of this Court consisting of *Sir Arthur Strachey*, Chief Justice, and *KNOX, J.*, in *Queen Empress v. Lalit Tewari* (1). In that case a reference asking for an enhancement of sentence being before a Judge of this Court, the Judge wrote an order declining to interfere, and signed and dated it. Subsequently, on the same day, the Judge reconsidered that order and erased it, substituting therefor an order calling upon certain convicts to show cause why the sentence passed up for disposal on the return of the notice to show cause, counsel appearing for the persons called upon contended that the Judge had no power to change the order, which had originally been written and signed by him, except on application for review of such order. On this point the Court held that having regard to the rules of the Court a judgment was not complete until it was sealed and that until a judgment was sealed it might be altered by the Judge concerned without the necessity of having recourse to any formal procedure by way of review of judgment. The report of this decision does not contain any reasons upon which the view was founded, namely, that the judgment was not complete until it was sealed.

The decision in *Queen Empress v. Lalit Tewari* (1) was followed in 1904 by a learned single Judge of this Court, *AIKMAN, J.*, in *Emperor v. Kallu* (2). In that case

(1) (1899) I.L.R. 21, All. 177.

(2) (1905) I.L.R. 27, All. 92.

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a petition was made to this Court in the form of an appeal against the order of the Sessions Judge and was forwarded through the Superintendent of the jail in which the applicant was confined owing to his failure to furnish the security required under the provisions of section 123 of the Code of Criminal Procedure. It was summarily dismissed on the 10th of May, 1904, by the following order :

"No appeal lies in this case and no sufficient ground appears for interference in revision. The application is dismissed."

The order was signed by the Judge but had not been sealed when an application for review was presented to this Court and was heard by the same Judge who relying upon the decision in *Queen Empress v. Lalit Tiwari* (1) held that he was not precluded from reviewing the order as it had not yet been sealed.

Both these decisions were again relied upon and followed in 1916 by a Division Bench of this Court, (TUDBALL and WALSH, JJ.) in *Govind Sahai v. Emperor* (2). In that case the facts were these. One Govind Sahai was called upon by a Magistrate to show cause why he should not be bound over to be of good behaviour. An order was passed against him and he was directed to furnish security. He appealed to the District Magistrate, but his appeal was dismissed. He then applied in revision to this Court on 26th June, 1915. On 22nd July, 1915, BANERJEE, J., sitting singly after hearing counsel on his behalf passed an order rejecting the application. That order was signed by BANERJEE, J., but was not sealed. On 6th September, 1915, Govind Sahai presented an application to the learned CHIEF JUSTICE on which the following order was passed :

"Lay before BANERJI, J., and let this man be informed of the date fixed for hearing."

On the 10th of November, 1915, BANERJI, J., passed an order referring to the Division Bench the question as to whether or not an application for review can lie in the circumstances of the case as he appeared to be in doubt

(1) (1899) I. L. R. 21 All. 177.

(2) A.I.R. 1916 All. 183.

as to the exact nature of this application and he remarked in the course of his order that—

“It is difficult to say whether this last application is a fresh one for revision or an application for review of judgment.”

BANERJI, J., referred the case to a Bench with a view to getting a decision on the question mentioned above, pointing out that a Full Bench of the Calcutta High Court in the matter of the petition of *F. W. Gibbons* (1), held that no review could lie. The Division Bench of this Court observed that in view of a two-Judge decision of this Court in *Queen Empress v. Durga Charan* (2), the High Court has no power under section 369, Criminal Procedure Code, to review an order dismissing an application for revision and the only remedy is by way of appeal to the prerogative of the Crown as exercised by the Local Government. In the same case *Gobind Sahai v. Emperor* (3) the court was pressed with the decisions in *Queen Empress v. Lalit Tiwari* (4) and in *Emperor v. Kallu* (5) above and it was urged that the order of BANERJI, J., not having been sealed, it was still open to the applicant to come to this Court with a fresh application and the Court held that the two rulings *Queen Empress v. Lalit Tewari* (3) and *Emperor v. Kallu* (5) did apply to the case, but in accordance with those two rulings it was only the Judge concerned who could deal with the matter. The Division Bench accordingly rejected the application in so far as it was an application for review, and sent back the matter to BANERJI, J., in so far as it was an application contemplated by the rulings. BANERJI, J., thereafter heard the counsel for the applicant and rejected the petition.

In *Lachhman Chamar v. Emperor* (6) a learned Single Judge of this Court, BAJPAL, J., observed :

“The dismissal of the jail appeal must be deemed to be a provisional dismissal in no way affecting the right of the appellant to have his counsel heard under the proviso to section 421, Cr. P. C., in connection with the

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(1) (1887) I.L.R. 14, Cal. 42.

(3) A.I.R. 1916, All. 183.

(4) (1899) I. L. R. 21 All. 177.

(2) (1885) I.L.R. 7, All. 672.

(5) (1905) I.L.R. 27 All. 92.

(6) A.I.R. 1934, All. 988.

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appeal filed under section 419, Cr. P. C. The practice in the High Court is that a summary dismissal of a jail appeal by a learned Judge does not in any way debar the hearing of an appeal filed by counsel. Indeed, the fixing of seal is delayed till the period of limitation is over."

The same point came up before a Division Bench of the Oudh Chief Court consisting of THOMAS, C. J., and YORKE, J., in *Jodha v. Emperor* (1). In this case some of the earlier decisions of the Court were considered and the learned Judges observed :

"Learned counsel for the appellants puts forward the contention that when an appeal is dismissed summarily either by a single Judge or by a Bench of this Court and the order of dismissal is written and signed and dated by the Judge or Judges, the order still remains incomplete until it is sealed by reason of rule 7 of Chapter XX of the Rules of the Chief Court, which relates to the sealing of judgments. This contention appears to us to be without force. The rule merely provides that when written judgment has been delivered and when a judgment or order recorded by a judgment-writer has been signed by the Judge or Judges who delivered or passed it after inspection, supervision and correction, the Bench Reader shall seal such judgment or order with the seal of the Court. We are of opinion that that is a provision for a ministerial action intended, as it were, to authenticate the judgment. One good reason for such sealing may be that the practice in the High Courts is that the judgments are signed by the Judges with their initials only and the seal might be considered necessary

(1) A.I.R. 1940, Oudh. 369.

in order to show that the initialled signature was a signature known and recognized in the Court. For the rest learned counsel bases his arguments on *Holai v. Emperor* (1) in which it was held by LINDSAY, J. C., that the summary dismissal of a jail appeal is no bar to a subsequent entertainment of another appeal presented by the prisoner's counsel who ought to be given an opportunity for arguing the case."

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In that case reliance was placed on a case of the Allahabad High Court in *Emperor v. Bhawani Dihal* (2) in which it was held that the dismissal of the jail appeal must be deemed to be a provisional dismissal in no way affecting the right of the appellant to have his counsel heard under the proviso to section 421, Criminal Procedure Code, in connexion with the appeal filed under section 419, Criminal Procedure Code. The learned Judge went on to refer to the rule in regard to the sealing of an order in jail appeals in the High Court, which is the same as that in this Court, and he remarked :

"The practice in the High Court is that a summary dismissal of a jail appeal by a learned Judge does not in any way debar the hearing of an appeal filed by counsel. Indeed, the fixing of seal is delayed till the period of limitation is over."

With great respect I am unable to agree with the view that the dismissal of a jail appeal must be deemed to be a provisional dismissal in no way affecting the right of the appellant to have his counsel heard under the proviso to section 421 on an appeal filed under section 419 subsequent to the summary dismissal of an appeal filed under the provisions of section 420, Criminal Procedure Code. In *Emperor v. Khayali* (3), it was held by a Bench of the Allahabad High Court that—

"Where a petition of appeal submitted through the Superintendent of the jail in which the appellant is confined has been considered

(1) (1916) 36, I.L.R. 133.

(2) (1906) A.W.N. 903.

(3) (1922) I.L.R. All. 759.

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and rejected by a Judge of the High Court, it is not open to the appellant thereafter to present through counsel a second petition of appeal."

The learned Judges observed :

"We are further of opinion that the practice which has been followed in recent years of treating jail appeals summarily dismissed by Judges of this Court as not finally dismissed unless and until they are sealed at the end of the period of limitation has no justification in law. Such appeals as soon as a Judge or a Bench of Judges has decided them and signed or dated their order are decided appeals and in such cases a represented appeal subsequently filed is not maintainable."

With due deference to the learned Judges who decided *Queen Empress v. Lalit Tiwari* (1) which was later on followed in other decisions cited above, I am unable to agree with their view that a judgment was not complete until it was sealed. The report of the decision in *Queen Empress v. Lalit Tiwari* (1) as I have already said does not contain any reasons upon which it was founded. The rule itself, as it then was, and as it now exists, does not show that a judgment or order signed or dated by a Judge or Judges is not complete until it was sealed. The rule merely provides that when the transcript of the judgment or order prepared by the judgment clerk has been filed with the paper-book of the case, the Bench Reader shall submit it to the Judge or Judges who delivered it and it shall then be signed or initialled by such Judge or Judges after such corrections as may be considered necessary and thereafter it shall be sealed with the seal of the Court by the Bench Reader. The provision of sealing is a provision for a ministerial action intended, as it were, to authenticate the judgment, and one good reason for such sealing may be that the practice in the High Court is that judgments are initialled by the Judges

(1) (1899) I.L.R. 21, All. 177.

and the seal might be considered necessary in order to show that the initialled signature was a signature known and recognized by the Court.

It is said that there is some hardship to convicted persons in this view being taken. In practice, taking into consideration rule 14 of Chapter XVIII of the Rules of the Court, 1952, there should be no hardship to convicted persons. That rule says :

"Jail appeals shall be submitted to a Judge for orders *after the expiry of the period of limitation*, jail appeals by accused persons convicted in the same trial being submitted together. If an appeal arising out of the same case has been presented previously in court, the fact shall be noted on the fly-leaf before the papers are submitted to a Judge for orders and the Judge shall, if such appeal has not already been decided, direct that the appeal be admitted and connected with such previous appeal."

The rule that jail appeals shall be submitted to a Judge for orders after the expiry of the period of limitation removes the hardship to convicted persons if the appeals are disposed of before the period of limitation expires because a convicted person has the right to present a represented appeal within time to the Court so that his counsel may be heard upon it, more particularly when in the earlier jail appeal he has failed to make a representation to the court that he wishes to be personally heard upon such jail appeal. Where the accused is in custody his personal attendance shall not be required unless so ordered by the Court. And a prayer for the personal attendance of the accused in Court shall not, according to the Rules of the Court, ordinarily be entertained if not made in sufficient time before the date of hearing to enable arrangements to be made with the officer in charge of the jail in which the accused is confined for his attendance in the Court. There is another rule under Chapter XVIII of the Rules of the Court, 1952, which has an important bearing upon the matter. It

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is rule 4 ; and it enjoins that where a petition of appeal or an application for revision has been previously presented by the appellant to the officer in charge of the jail, the petition of appeal or application for revision filed on his behalf through an Advocate shall mention that fact if known to such Advocate. In such case the Bench Reader shall obtain an order from the Court that the two cases be connected and heard together. Where an appellant, or a petitioner making an application for revision, has presented his memorandum of appeal or the application for revision to the officer in charge of the jail, there is no justification for him to fail to mention that fact in his petition of appeal or application for revision filed subsequently on his behalf through an Advocate. The Advocate may be ignorant of that fact unless he is informed of and advised about it. But there is no justification for the appellant or the petitioner to withhold that fact from his Advocate so as to obtain the benefit of the rule, namely, that the Bench Reader shall obtain an order from the Court in such a case that the two cases be connected and heard together. Having regard to the rules aforesaid, there is no real hardship in such appeals being heard and disposed of together and it would always be open to learned counsel who has been consulted by friends or relations of convicted persons to obtain from jail and the other made through counsel, be heard together by adopting the simple device prescribed under the rules of mentioning that an earlier appeal or a petition or revision was sent by the convicted person from the jail where he is confined. Upon the whole matter, therefore, I am clear in my mind that it cannot be said that the judgment of the High Court is not delivered unless and until the seal of the Court is affixed to such judgment.

It follows from what I have said above that this represented appeal under the provisions of section 419, Criminal Procedure Code, is not maintainable after the jail appeal filed under the provisions of section 420 had been summarily dismissed under the provisions of section 421 of the Code of Criminal Procedure and that this Court has not and never has had any inherent power

to review its own judgment, and section 561-A of the Code of Criminal Procedure does not confer on it any power so to do. Consequently, I would dismiss this petition of appeal.

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After having expressed my views on the points of law referred to the Bench, it would be unnecessary on my part to proceed with the appeal on merits. But since there is a difference of opinion between us and the "case" will have to be referred to a third Judge as provided by section 429 of the Code of Criminal Procedure, I would briefly give my reasons for the conclusion that on merits too the appeal cannot succeed. I have had the advantage of looking into the judgment of my brother MULLA, J., on the merits of the case and I regret I do not share his views when he has come to the conclusion that upon merits the appeal should succeed.

That an armed dacoity took place at the house of Salik Ram in mauza Ladpur on the night between the 22nd and 23rd of July, 1953, at about 11 p.m. is a fact which can admit of no doubt whatsoever. It was clearly proved by the prosecution evidence, and it was not at all challenged before us during the course of arguments. Salik Ram was sleeping in his *sudri* where a lantern was burning. He was awakened by the sound of some footsteps. He felt apprehensive and he awakened his wife Smt. Radhika Devi, who was sleeping near him. He also called out his brother Balak Ram, who was sleeping in another part of the house. Salik Ram took up a torch, went to the outer door and when he flashed the torch he saw fifteen or twenty persons armed with various weapons. One of the dacoits began to assault Salik Ram. Alarm was raised. Salik Ram's wife Radhika Devi rushed towards Salik Ram. Some of the dacoits caught hold of her and began to beat her and forced her to deliver the bunch of keys. The dacoits succeeded in inflicting nine injuries on Salik Ram and seven on Radhika Devi. The alarm attracted some of the villagers. The dacoity lasted for about half an hour or forty-five minutes during which torches were flashed both by the dacoits and by the villagers who had assembled there in spite

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of gun-fire by the dacoits to scare the villagers away. The dacoits ultimately decamped with cash and valuable worth about Rs.12,000. The witnesses saw the dacoits leaving the house in the light of the torches and also in the moon-light. Three dacoits, it is said, were recognized. They were Debi Murao, a resident of Barhainpura—Ghatam, Chinta Kurmi, a resident of village Amrita, and a third man whose name was not known but who was by caste a Kahar and was also resident of village Amrita.

Next morning at 10 a.m. Salik Ram went and lodged the first information report at police station Bisalpur which was five miles away. In that report the three dacoits who were recognized were mentioned. A list of the looted property was also submitted along with it. When the report was made Sub-Inspector Krishna Pal Singh, the Station Officer of police station Bisalpur, happened to be absent. The investigation was taken up by him two days later. A search of the two persons named in the first information report did not lead to the recovery of any property from their house. The Sub-Inspector on that account took no action against them and did not prosecute them. Failure to prosecute them was made the subject of severe criticism by the learned Sessions Judge. My learned brother is of the view that Salik Ram had correctly mentioned the names of those two persons whom he had recognized but the investigating agency on account of oblique motives permitted himself to let go those two culprits. That view may legitimately be entertained ; and it may on that account be also stated that the investigation was tainted. But on that account alone I am not able to agree that it is not possible to place any reliance upon the evidence of identification.

Another person who was prosecuted in this case was one Sri Ram. He took up the plea that he was known to the prosecution witnesses including Salik Ram and Radhika Devi from before. His plea was given effect to by the trial court and he was, therefore, acquitted. We are not concerned with the acquittal of Sri Ram. The State Government has not appealed against that acquittal

and I do not propose to make any remarks upon it. I am, however, concerned with the criticism made by learned counsel for the appellant to the effect that wherever a witness gave evidence against Sri Ram, he must be distrusted against any body else because Sri Ram has been acquitted. There is in my opinion no force in this argument. The evidence of such a witness may be reliable as against persons other than Sri Ram. The learned Sessions Judge has applied his mind intelligently to this aspect of the matter and in my opinion his conclusion cannot be disturbed upon the simple fact that Sri Ram was acquitted.

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The prosecution evidence established beyond any shadow of doubt that a lantern was burning in the *sadri* where Salik Ram and his wife had been sleeping. Salik Ram had picked up a torch and he had flashed it over the dacoits when he reached the outer door of the house. He was followed by his wife Smt. Radhika Devi. Simultaneously with the flashing of the torch by Salik Ram the dacoits rushed towards him. One of them made assault on him with a lathi and caught him. Some of the dacoits caught hold of Smt. Radhika Devi as well and they gave her a beating. Smt. Radhika Devi swore that during that act the accused, (picking out Gokul appellant), who was wearing a black coat, was holding a spear. Both these witnesses and the other witnesses for the prosecution were clear in their evidence that torches were flashed on both sides, namely, by the dacoits and by the villagers who had assembled outside the house. Upon that state of evidence it can reasonably be held, as has also been held by my learned brother, that there was ample light for the witnesses to see the features of the dacoits ; that the witnesses had opportunity of seeing the dacoits ; that the inmates of the house, inclusive of Salik Ram and his wife who had been given beating by the dacoits, had a better opportunity of seeing the dacoits from closer quarters than those who were outside who might have caught sight of the faces of some of the dacoits in an accidental flash of the torch.

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The appellant was arrested on the 24th of December, 1953. The other suspects were arrested on different dates. The evidence that was led on behalf of the prosecution satisfactorily proved that the appellant put himself under a veil just after his arrest as his identification proceeding was to be held. He was also kept throughout under veil when finally he was admitted to jail. The evidence also satisfactorily proved that the witnesses had had no access to him before the identification proceedings were held. The evidence further proved that the witnesses did not know him from before and that they saw him for the first time during the course of the commission of the dacoity and thereafter inside the jail precincts when he was sent up for identification in the second parade held on the 13th of March, 1954. The plea taken by the appellant in the court of the Committing Magistrate was to the effect that he was on inimical terms with Salik Ram the complainant and for that reason the case was initiated against him. His plea in that court further was that the witnesses stated under the influence of the police; that the police detained him at police station Katra for two or three days after arresting him where he had been shown to the witnesses; that they sent him and the witnesses to Shahjahanpur by one and the same train and he was shown to the witnesses at railway station Bisalpur as well. In the Court of Session his plea was that Salik Ram knew him from before and he was shown to the other prosecution witnesses at police station Bisalpur. The difference between the two versions was, therefore, obvious. There was no evidence on the side of the accused to prove that Salik Ram or his wife or the other prosecution witnesses knew him from before or that Salik Ram had been inimical towards him and on that account the case was initiated against him, or that at police station Katra he was shown to the witnesses, or that the witnesses travelled along with him in the same train to Shahjahanpur, or that the witnesses saw him either at police station Bisalpur or at railway station Bisalpur during the course of the transit. Not a single question was put in that behalf to any of the witnesses who

had identified this accused. Head Constable Shafiqul Rahman, P. W. 16, who was present at the time of the arrest of Gokul on the 24th of December, 1953, and also at the time when he was put under *parda* in the *hawalat*, swore that so long as the accused was there in his custody no one had access to him or had the opportunity of seeing him. Not a single question was put to this witness in cross-examination. It was Zahid Husain Constable, P. W. 17 who had escorted Gokul from the Shahjahanpur Jail under *parda* to the Pilibhit Jail on the 28th of December, 1953. The journey had to be covered by train. Railway station Bisalpur lay on the way. Zahid Husain stated that the train stopped at Bisalpur Railway Station for four or five minutes. He further stated that the Station Officer of police station Bisalpur and the Head Constable met him there. Sub-Inspector Krishna Pal Singh, who was in charge of the investigation of the case till the 6th of December, 1953, when he was transferred from police station Bisalpur and when he handed over the investigation to Sub-Inspector Tyagi, was produced on behalf of the prosecution, and not a single question was put to him on behalf of the accused to suggest or to prove that at railway station Bisalpur the prosecution witnesses had been brought with a view to have a look at this accused. The contention of Gokul raised by him in the court of Session that Salik Ram knew him from before and that he was shown to the other prosecution witnesses at police station Bisalpur had, therefore, no foundation whatsoever. In fact after his arrest he was never taken to police station Bisalpur before the identification proceedings were held in jail. The mere fact that Salik Ram with his wife sometimes resided in Bisalpur will not be proof of the factor that when this accused was being escorted to the Pilibhit Jail, they had been brought over to railway station Bisalpur so that they may have a look at him. It is true that no burden is cast upon the accused to raise a definite theory or to produce evidence in support of that theory, and if he can raise a reasonable doubt about the prosecution case on the point, he ought to be given the benefit of doubt. In

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view, however, of the circumstances of the case and the evidence on the record, I do not think that any reasonable doubt arises that there was an opportunity for the investigating officer to show the appellant to Salik Ram and Smt. Radhika Devi, or that such an opportunity was availed of.

At the identification parade held in jail on the 13th of March, 1954, there were five suspects inclusive of this appellant and there were twenty-five undertrials. The appellant has both of his ears bored. From amongst the undertrials there were ten such persons who had their ears bored. The Magistrate who conducted the identification proceedings took all the necessary precautions which were required in a matter of this nature, in order to eliminate the chances of a false or incorrect identification. It has been suggested that the proportion of three suspects who had their ears bored with ten undertrials of similar nature was too small a proportion to eliminate the chances of a wrong identification and that the proportion of five other persons to one such accused for identification was the minimum desirable proportion for the purpose of satisfying a court that the identification of the accused was not a question of accident. Even if that assumption were allowed to prevail, it is not, however, possible to discard these proceedings on that ground. It is only proper to hold, as was held in similar circumstances in *Naubat Singh v. Emperor* (1), that the evidence of identification should in the circumstances be subjected to a more rigid scrutiny than if the proper standard had been maintained. At the identification proceedings held on the 13th of March, 1954, Gokul appellant had been correctly identified by Salik Ram, who had picked out two of the suspects and made one mistake, and by Baldeo P. W. 2, who had picked him out correctly without making any mistake, as also by Smt. Radhika Devi, who had made three correct identifications and had made one mistake, and further by Hori and Umrao, the former having made two correct identifications and two mistakes and the latter having made one correct identification and

(1) A.I.R. 1935, All. 653.

one mistake. These witnesses adhered to their identification of this accused in the court of the Committing Magistrate and further in the court of Sessions. The learned Sessions Judge did not consider it safe to rely upon the evidence of identification by Hori and Umrao because of the large number of mistakes committed by them. But he regarded the evidence of identification by the other three witnesses, namely, Salik Ram, Radhika Devi and Baldeo, as clear, cogent and convincing in order to come to the conclusion that Gokul was one of the dacoits who had committed the dacoity on that night at the house of Salik Ram. It may be stated that both Salik Ram and Smt. Radhika Devi had sufficient opportunity to see the accused. There was enough light and they came in close contact with them. As regards Baldeo it has been contended that he is the Chowkidar of the village and he was present at the time of the making of the first information report and that since his name was not specifically stated in the first information report as one of the witnesses who had seen and recognized the accused at the spot, his evidence cannot safely be depended upon. Even if the evidence of Baldeo were to be discarded, I am of opinion that having regard to the circumstances of the case the evidence of Salik Ram and Smt. Radhika Devi was sufficiently clear and convincing to warrant the charge against the appellant. As I have already said, there was nothing on the record to prove that Salik Ram had any enmity against the appellant to prompt him to implicate him in a false charge. If that had been the compelling motive, it would have been far more easy for Salik Ram to mention this accused specifically by name in the first information report. Here we find that directly after the arrest the appellant was placed in the lock-up. Every precaution was taken that the witnesses should not have access to him. He was after a time placed in a line with a large number of other persons, unconnected with the particular charge, who were as far as possible dressed in the same manner and who had no marks which could distinguish one from another. Then in the presence of a Magistrate the

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witnesses were called in one by one. As each witness completed his identification, he was removed to a place where he could not communicate with any other witness. Every precaution was taken which could be taken to prevent dishonest identifications. At the end of this very severe test certain witnesses identified certain persons. That was not all. The witnesses had then to identify the same man again when he was standing with others in the dock in the Committing Magistrate's court and they finally had to identify the same men once more when he was standing with others in the Sessions court. The learned Sessions Judge in scrupulous fairness to the accused ordinarily refused to accept such evidence of identification unless the witnesses had identified the same man in all the three places and unless their performance of identification with regard to correct and incorrect identification was sufficiently weighty. The defence had there to explain how the witnesses had come to make the identification unless they had really seen the man at the time they had stated. Attempts were made to show, but nowhere established, where the Sessions Judge has found to the contrary, that the witnesses had known such a man before or that he had been shown to him in order to assist identification.

In the absence of evidence, it cannot for a moment be suggested or presumed that when the witnesses were led to the identification parade they had been told to pick out persons with their ears bored. The only argument put forward upon this point has been that it stands to reason that no man can identify, after seven or seven and a half months, a man whom he had seen only once. I do not accept this argument. It is based upon mere presumption and contradicted by the fact of the identification itself. Men differ very largely in their powers of observation. One man will remember a face for a very long period, though he has only seen its possessor once and for a very short time. Other men who are unobservant may not be able to identify persons whom they had a good opportunity of identifying even a short time afterwards. The power to identify varies according to the power of observation

and the observation may be based upon small minutiae which a witness cannot describe himself or explain. It has no necessary connexion with education or mental attainments ; and, as has been observed in *Khilawan v. Emperor* (1), an illiterate villager may be and frequently is much more observant than an educated man. In these circumstances I am satisfied to accept the facts that the identification was made under these very difficult conditions and the appellant's counsel has not been able to explain the identification away.

Both Salik Ram and Smt. Radhika Devi came in very close contact with the appellant and both had been manhandled by the dacoits. There is no justification upon the state of evidence on the record to discard their testimony even if the evidence of the third witness Baldeo were for the sake of precaution to be excluded for the time being. After having gone through the evidence on the record, I am satisfied that the appellant was one of those who had committed the offence and he has been rightly convicted under section 395, Indian Penal Code, and sentenced to five years' rigorous imprisonment. I would, therefore, dismiss this appeal.

MULLA, J., :—I have had the advantage of reading the decision of my learned brother Roy, but I am sorry to say that I have not been able to agree with his conclusions on two questions. When the appeal came before me I was of the opinion that several important points of law were involved in the case. I, therefore, referred four questions of law to a Division Bench and when this Bench was formed, I found myself a member of that Bench. These four questions are mentioned in the judgment of my learned brother. I need not repeat them. Similarly it is not necessary to state the facts and circumstances which led to this reference. They are also incorporated in the judgment of my learned brother.

I will straightaway take up these questions one by one.

Question no. 1. Is the proviso to section 421, Criminal Procedure Code, which makes a distinction between

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(1) A.I.R. 1928, Oudh, 430.

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the appeals filed under section 419, Criminal Procedure Code, and section 420, Criminal Procedure Code, justifiable, or whether it violates Article 14 of the Constitution of India, as it lays a basis for discrimination which is neither reasonable nor compatible with the principles of justice?

My brother found the proviso justifiable in the light of the circumstances which he had considered. He held that it did not offend against Article 14 of the Constitution of India. In my opinion that part of the proviso which excludes the appeals filed under section 420, Criminal Procedure Code, from its benefit makes it a discriminatory piece of enactment, which not only offends against Article 14 of the Constitution of India but also violates the fundamental principles of justice and equity. I now proceed to give my reasons.

I will first take up the question whether the rule of procedure laid down in the provision is justifiable or not. It would be justifiable if it is consistent with the juristic concept of an appeal, but if it amounts to a complete negation of the right of appeal itself given to a convicted person under the Criminal Procedure Code, it obviously would become unjustifiable, for it takes away from him the right which is given to him by statute. I need not mention the sections of the Criminal Procedure Code which have given this right of appeal to a convicted person.

Two questions arise at this stage. Firstly, what is an appeal? I will accept the definition of "appeal" given in Wharton's Law Lexicon, 14th Edition, at page 67. It runs as follows:

"The judicial examination of the decision by a higher court of the decision of an inferior court."

Then comes the second question: what are the rights given to a convicted person, when he is given the right to appeal? I may straightaway admit that the right to appeal is not an inherent right, but can only be conferred by statute. In the words of Lord Chancellor

LORD WESTBURY in *Attorney General v. Herman James Sillem* (1) :

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"The creation of a new right of appeal is plainly an act which requires legislative authority. The court from which the appeal is given and the court to which it is given must both be bound and that must be the act of some higher power. It is not competent to either Tribunal or to both collectively to create any such right."

It cannot be disputed that such a right has been created in favour of a convicted person by the Criminal Procedure Code. Appeals to the High Court are filed under section 410, Criminal Procedure Code, and to the other appellate courts under section 408, Criminal Procedure Code. The extent of this right is mentioned in section 418, Criminal Procedure Code. The relevant part of section 418, Criminal Procedure Code, runs thus :

"An appeal may lie on a matter of fact as well as matter of law"

It is, therefore, a comprehensive right and a convicted person is entitled to have the decision of the trial court reversed or modified not only on a question of law, but also on a reassessment of facts. To quote Lord WESTBURY again, an appeal is "the right of entering a superior court and invoking its aid and interposition to redress the error of the court below". Similarly in the Law Lexicon of British India by Ramnath Iyer, 1940 Edition, the following extract is given under the head "appeal" :

"In the Law Dictionary by Bouvier, an appeal is defined as the removal of a case from a court of inferior to one of superior jurisdiction for the purpose of obtaining a review and re-trial and it is explained that in its technical sense it differs from a writ of error in this that it subjects both the law and the facts to a review and re-trial ; while the latter is a common law process which involves matter of law only for re-examination."

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This point is again stressed by Lord CRANWORTH in *Attorney General v. Sillem* (1). Lord CRANWORTH observed :

"I am aware that the courts of error on an appeal have larger powers than they can exercise on a bill of exceptions. On a bill of exceptions they have only to say whether there has or has not been a misdirection. If there has, the duty of the court of error is simply to award a "*venire do novo*"; if there has not, to refuse it. But on an appeal to the court of error, the court is bound to give such judgment as the court below ought to have given."

It is not necessary to multiply the observations of great jurists to prove that the right to appeal includes two rights, firstly, that the case should be considered on facts as well as on law by the appellate court, and secondly, that the appellant has a right to get a judgment after due adjudication from the appellate court and not merely an order.

It cannot be contended that the right of appeal given to a convicted person in India is in any way less extensive than the right given in England and that these observations are not applicable to the courts in India. I have already quoted above the relevant portion of section 418, Criminal Procedure Code, which gives the extent of this right.

I will now deal with another section of the Criminal Procedure Code before going to section 421, Criminal Procedure Code. This is section 340, Criminal Procedure Code. It runs thus :

"Any person accused of an offence before a criminal court, or against whom proceedings are instituted under this Code in any such court, may of right be defended by a pleader."

This right is also recognized under Article 22 (1) of the Constitution of India. It is apparent from the language

(1) 10 H.L.C. 704, 719.

of section 340, Criminal Procedure Code, that this right is given to an accused before any criminal court. The appellate court in a criminal case is a criminal court within the meaning of this section. It is, therefore, clear that the right of defending himself can be exercised by an accused both in the trial court and the appellate court. An appeal is only an extension of the trial. In Oxford Dictionary, Vol. I, page 398, an "appeal" is defined as the transference of a case from an inferior to a higher court or tribunal, in the hope of reversing or modifying the decision of the former. It cannot seriously be contended that the right given under section 340, Criminal Procedure Code, applies only to the trial court and not to the appellate court.

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As soon as a person is accused of an offence and placed on his trial, there are three courses open to him :

- (1) He can refuse to defend himself.
- (2) He personally defends himself without engaging a counsel.
- (3) He engages a counsel for this purpose.

Section 340, Criminal Procedure Code, is merely an enabling section and not a disabling provision. It gives a right to an accused to be represented by a lawyer, but it does not take away his inherent and basic right to defend himself. It is enacted only to stress the additional right given to him to be represented by a counsel. If any other interpretation is to be given to this section, it will uproot the very foundations of criminal justice. Primarily an accused has to defend himself and it is a secondary matter that he utilizes the services of a lawyer. Section 342, Criminal Procedure Code, under which the statement of an accused person is recorded, is enough to support this view. It is really the accused who defends himself and the lawyer only helps him, acting as his representative in his defence.

If an accused cannot or does not engage a lawyer at the stage of appeal, his own right to defend himself and challenge the order of conviction cannot be taken away from him. I agree with the view expressed by my brother Roy that the right given to an accused to defend himself

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under section 340 (1) does not extend to be provided with a lawyer by the State, but that is not the question involved in this case. The question for determination is, whether he has the right to defend himself personally or not. I am of the opinion that justice would become a mockery, if an accused is not permitted to defend himself and it is this right which has been taken away from an appellant under section 420 by the proviso to section 421 (1), Criminal Procedure Code, while it is accepted in the case of an appellant under section 419.

I will now cite sections 419, 420 and 421 of the Criminal Procedure Code. They run as follows :

"Section 419—Every appeal shall be made in the form of a petition in writing presented by the appellant or his Pleader, and every such petition shall (unless the court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against,

Section 420—If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper appellate court.

Section 421 (1)—On receiving the petition and copy under section 419 or section 420, the appellate court shall peruse the same and if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily :

Provided that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

Section 421 (2)—Before dismissing an appeal under this section, the court may call for the record of the case, but shall not be bound to do so."

Sections 419 and 420, Criminal Procedure Code, deal only with the method of presenting the appeal. In the first section the appeal is presented by the appellant himself, who is present in court or through a counsel and in the second section it is filed through the jail authorities. Section 421, however, prescribes the manner in which these appeals should be disposed of. It is in the manner prescribed for disposing of these appeals that the right of appeal given to a convicted person who files his appeal under section 420, Criminal Procedure Code, has been considerably restricted, if not completely taken away. This manner violates the basic principles of natural justice and reduces the right of appeal conferred by the earlier sections to a farce. It is in direct conflict with sections 418 and 340 of the Criminal Procedure Code cited above.

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But before enlarging this point I will like to place the background of this extraordinary provision which to the best of my knowledge finds a place neither in the Criminal Procedure Code of the United Kingdom, nor the United States of America. The first Criminal Procedure Code was enacted in the year 1861, only four years after the Mutiny. It was amended in the year 1872 and again in 1882 and then in 1923. A recent amendment was made only two years ago. The power to dispose of appeals filed from jail in a summary manner after perusing the judgment of the trial court and the grounds of appeal only, without giving an opportunity to the appellant to appear before the court and defend himself, was given to the appellate courts in the very first Code of 1861. The number of the section investing the appellate courts with this power changed in the succeeding Codes, but up to this day it remains unchanged on the statute, although the Criminal Procedure Code was substantially amended only two years ago. It is thus a legacy of the year 1861. The legislative authority which framed the laws in the year 1861 was really an executive authority. It was the law enacted by the alien rulers for their subjects and not a law framed by the representatives of the people for the people. Administrative considerations were, therefore, bound to dominate judicial consi-

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derations. The principles of natural justice had to be sacrificed for executive needs. A Police State was created and Police Courts were necessary to back the Police Raj. English Officers filled all the appellate courts as well as most of the trial courts. The District Magistrates and the Sessions Judges, who were the appellate courts, apart from the High Court, were primarily executive officers. It was the "steel frame" of an alien Government and they had to back each other. It is in this background that section 421, Criminal Procedure Code, should be understood and analysed. The basic right of appeal was, therefore, throttled in order to carry out the wishes of the executive in the garb of justice. For years there was a "massacre of the innocents". The District Magistrates and Sessions Judges fully utilized the provisions of section 421, Criminal Procedure Code, and started dismissing the appeals wholesale without hearing either the appellant or his counsel. At this stage the High Courts interfered. They succeeded in saving the appeals filed under section 419, Criminal Procedure Code, through a counsel from being guillotined, but they could do nothing for the prisoner in jail, who could not afford to engage a counsel. Perhaps the Judges found themselves helpless in view of the law which empowered the appellate court to condemn them unheard. The law first chained the prisoners and then made them voiceless. Even if some of Judges found the law odious and unjust, they could not invoke the principles of natural justice, for in those days no right was conferred upon the subjects by any constitution which was higher than the legislative authority. The injustice done to the appellants who had filed their appeals from jail was, therefore, either ignored or such reasons which in my opinion are quite fallacious were advanced to support it. It was easy to deny justice to the dumb convicts, for there was no one to plead their cause and no voice to denounce this inhuman approach and procedure.

It was a Judge of our High Court who raised a powerful voice against this injustice for the first time. It was in the year 1891 when MAHMUD, J., was acting as

the Vacation Judge that a jail appeal came before him. The appellant was sentenced to ten years' rigorous imprisonment and he was not on bail. He, therefore, could not be present when the appeal came to be heard. MAHMUD, J., came to the conclusion that he could not adjudicate unless he heard the appellant and so the matter was referred to a Full Bench. That case is *Queen Empress v. Pohpi* (1). I will refer to this case again and again in this decision, because in my opinion it is the only case in which the relevant juristic principles were considered. At this stage I will cite only one extract. MAHMUD, J., observed :

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"I think it is necessary for me to say that, if it is true that the law of British India makes it possible for me sitting here as a Judge, in the first place, by dint of my writ to order a person to be imprisoned and tied by a chain, then in the next place to require the mockery of giving him notice, the mockery of asking him to attend, when I, by dint of the exercise of my own power have made it impossible for him to attend, and then have the solemn mockery of having his name called out ; if this is the law of British India, I hope the sooner it is abrogated the better."

It would appear from this extract that up to that time the prisoner-appellant under section 420 was not permitted to appear in Court, even though a notice was issued to him. All the other Judges in that case, however, disagreed with MAHMUD, J. and dismissed the appeal without giving an opportunity to the appellant to appear before them. A glimpse of the mind of the other Judges can be gathered from the observations of YOUNG, J., in the same case, which were to the effect that summoning the appellant to the High Court would amount to suspending his sentence and this cannot be done unless there was a special provision made for it under some section of the Criminal Procedure Code. This "mockery",

(1) (1891) I.L.R. 13, All. 171.

1957 therefore, continued in our High Court till 1927, when
 GOKUL a second Full Bench in *Emperor v. Lal Bahadur* (1)
 v. agreed with MAHMUD, J., and dissented from the decision
 STATE given by the other Judges in *Pohpi's case*. They
 Mulla, J. observed :

"We have considered the decision of the Full Bench of this Court in *Queen Empress v. Pohpi* (2) and we are unable to agree with the reasoning in that case and are of opinion that the decision went too far when it held that an appellant from jail has no right to appear at the hearing of his appeal if he desires to do so and has no pleader to represent him. Similarly we find ourselves unable to agree with the learned Judges in the case of *Ram Prasad v. Emperor* (3) where they say, 'as he appealed from jail, he was not entitled to appear in person to argue his appeal'. We hold that where the stage has been reached of an appellant being given notice under section 422 of the Code of Criminal Procedure, he is entitled, if he so desires, to appear in person, if he is not represented by a pleader."

It was perhaps after this decision that our High Court Rules were changed and the prisoner was permitted to appear in person, if he so desired and if his appeal was not summarily rejected under the proviso of section 421, Criminal Procedure Code. With all respect to the learned Judges, I feel that they again refrained from commenting on the basic injustice of the proviso itself. The real question was whether an appellant has a right to be heard or not before he is condemned and his appeal is dismissed either summarily under section 421, Criminal Procedure Code, or after a full hearing under section 423, Criminal Procedure Code. This question was not decided. It, however, can be inferred from the language of this decision that an appeal filed under section 420, Criminal Procedure Code, could be rejected

(1) (1928) I.L.R. 50, All. 543.

(2) (1891) I.L.R. 13 All. 171.

(3) (1927) 103 I. C., 407.

without hearing the prisoner. So far as our High Court and probably the other High Courts also are concerned, the law remains at this stage up to the present day. To the best of my knowledge no Judge tried to test the justice or legality of the proviso to section 421 (1), Criminal Procedure Code, in the light of the right of appeal that was given to the prisoner. They merely interpreted the words of the proviso and inferred that it gave the appellate court a right to dismiss the jail appeal summarily without giving a chance to the prisoner to appear before them. They even went to the length of holding that the power to dismiss summarily absolved the appellate court from the duty of giving a judgment. It was a slippery incline and it was bound to lead to the practice that prevails in our High Court at the moment. This practice is that a form with the words "Admitted" and "Dismissed" printed on two sides across a line is attached to every appeal which is filed under section 420, Criminal Procedure Code. The learned Judge before whom this appeal is placed takes up this appeal in Chambers and after perusing the judgment, if he wants to dismiss it summarily, he simply draws a line across the word "Admitted" and signs it. I believe even the framers of section 421, Criminal Procedure Code, did not realize that a scratch of the pen is all that would be needed to dispose of an appeal under section 420, Criminal Procedure Code. Section 421, Criminal Procedure Code, inserted the thin end of the wedge and the High Courts as they were constituted in those days either on account of lack of sympathy with the prisoner in jail or for some other reason hammered it in up to the farthest end. The right of appeal which is a basic valuable right was first turned into a mockery by the proviso of section 421, Criminal Procedure Code, and then an element of farce was added to it by the High Court Rules. The practice has become so established that decision after decision is being given by every High Court to support the proposition that no judicial determination is necessary when an appeal is dismissed summarily. If I may say so with respect a colossal leaning tower of Pisa has been erected and when it is pointed out that the foundations are

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defective, you are asked not to look at the foundations, but to see and admire how many storeys have been raised over it. To all the arguments advanced by MAHMUD, J., in *Pohpi's* case (1), the only reply given was that it was an established practice of the High Court. One cannot help feeling that the basic principles of natural justice were sacrificed at the altar of convenience. The human approach to the case of the prisoner was lacking and unless there was something shocking in the judgment of the trial court, even a long term of imprisonment was not considered a sufficient reason for giving him a chance to represent his case. In my opinion the old decisions of the High Courts which were not tested and questioned are also to a great extent responsible for the unsatisfactory situation that exists to-day. In the short term of my office I have allowed an appreciable number of jail appeals and I believe my brother Judges have also done the same. I have no doubt in my mind that if the evidence in the appeals from jail is really tested by the Judges, a fairly large number of decisions of the trial courts would be reversed or modified. So far as I am concerned, I treat section 421, Criminal Procedure Code, as a nullity, for fortunately the discretion is left with the court. I do not accept the findings of the trial court unless borne out by evidence. Perhaps my experience at the Bar stops me from accepting the judgments of the trial courts at their face value.

I will now take the liberty of quoting an extract from an essay of PANDIT NEHRU. I am citing it not as an authority, but because it admirably reflects my feelings. The essay is entitled "The mind of a Judge". It is one of the essays published in the collection entitled "India and the World". The extract runs thus :

"There they sit these Judges in their courts and a procession of unfortunates passes before them. Some go to the scaffold, some to be whipped, some to imprisonment, to which may be added solitary confinement. They are doing their duty according to their abstract ideas of justice and punishment ;

(1) (1891) I. L. R. 13 All. 171.

they must consider themselves as the protectors of society from anti-social criminal elements. Do their thoughts ever go beyond these set ideas and take human shape, considering the miserable offenders as human beings with parents, wife, children, friends? They punish the individual, but at the same time they punish a group also for the ripples of suffering spread out and go far . . .

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"All this is very sad and deplorable no doubt, but what is the poor Judge to do? Is he to wallow in a sea of sentimentality and give up sentencing offenders against the law: If he is so soft and sensitive, he is not much good as a Judge and will have to give place to another. No. No one expects the Judge to embrace every offender and invite him to dinner, but a human element in a trial and sentence would certainly improve matters. The Judges are too impersonal, distant and too little aware of the consequences of the sentences they award. If their awareness could be increased as well as the sense of fellow-feeling with the prisoner, it would be a great gain."

I have cited this extract because in my opinion it is not the statute alone which is unjust, but the interpretation put upon it by the earlier Judges of the High Courts and which remained unquestioned by the Judges who followed is to a great extent responsible for reducing the right of appeal of an appellant under section 420 to almost a nullity.

I will now give my reasons for the opinion expressed above. I have already observed in the beginning of this decision that the right to appeal confers two rights on the appellant, (1) the right to defend himself and (2) the right to have an adjudication as distinct from an order from the appellate court.

Getting away from the phraseology of sections 419 and 420, Criminal Procedure Code, I will first consider

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what in essence is a jail appeal. In my opinion, a jail appeal is only the election of a convicted person to defend himself personally instead of getting himself defended by a counsel. Whatever reasons might have prompted him to adopt this course are irrelevant and immaterial, though it can safely be accepted that the dominant reason is a lack of means. Reading sections 419, 420 and 421, Criminal Procedure Code, they in a nutshell only amount to this much that such an appellant has no right to be heard in his defence before being condemned, but he can purchase this right by engaging a counsel and paying his fees. Can any State which claims to be democratic enact such a law which takes away from an accused person the right to defend himself personally without providing an equivalent alternative procedure? I have already observed above that the question of engaging a counsel is a question of means and for a convict who cannot afford a counsel, it is not possible to treat it as an equivalent alternative procedure. Similarly can any court who upholds such a law be called a court of justice? An emphatic "No" is the only answer that can be given to these two questions. If the State wants such a law to remain on the statute, it should openly proclaim that it wants administrative courts and not courts of justice. It may as well lay down that a convict without means has no right to appeal. If an appeal can be decided without hearing the appellant merely by the scratch of a pen and a signature, then the terms "appeal" and "justice" have lost their old meaning and a new meaning should be found for these words.

My learned brother has discussed the American procedure which gives a full opportunity of being heard to the appellant before his appeal is dismissed. I will, therefore, not refer to it, but I will mention the procedure followed in the United Kingdom under similar circumstances. The difference between the English procedure and the procedure laid down in India will bring into prominent relief the injustice of the Indian Law. In their own country the Englishmen preferred a procedure which is based on the principles of natural justice, but for their subjects in India an administrative

approach was considered to be more appropriate and suitable.

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I will now quote the relevant paragraphs from Halsbury's Laws of England to show what rights are given to a convict who appeals from jail :

Paragraph 856, Volume 9, page 442, 1909 Ed.—

- (1) "The Registrar must furnish the necessary forms and instructions in relation to notices of appeal and application under the Act to any person who demands them and to officers of courts, Governors of prisons and such other officers or persons as he thinks fit.
- (2) The Governor of a prison must cause such forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application to the court and cause any such notice given by a prisoner in his custody to be forwarded to the Registrar.
- (3) The Registrar must report to a Judge of the court any case in which it appears to him that a solicitor and counsel or counsel only ought to be assigned to an appellant, although no application has been made for the purpose."

Paragraph 850 of the same volume, page 440—

"The court of criminal appeal may at any time assign to an appellant a solicitor and counsel or counsel only in any appeal or proceedings preliminary or incidental to an appeal, if in the opinion of the court it is desirable in the interests of justice and if the appellant has not sufficient means to enable him to instruct solicitor or counsel."

Paragraph 851 of the same volume, page 440—"An appellant, although he is in custody, is, if he desires it, entitled to be present on the hearing of his appeal, but not when the appeal is on a question of law alone...."

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It would be seen from the paragraphs quoted above that in England an appellant has a right to be heard if his appeal is on facts and not on a point of law alone. The Registrar of the appellate court and the Governor of the prison where he is kept should give him full instructions explaining his rights to him and in suitable cases they should also recommend that he should be given legal assistance even if no such prayer is made by the appellant himself. It was on the acceptance of this well-established principle that a person cannot be condemned without being heard and Halsbury after enumerating the other important rights and liberties of an Englishman recognized in England observed :

"It seems to me that there should be added to this list the following rights which appear to have become well established—the right of the subject to have any case affecting him tried in accordance with the principles of natural justice, particularly the principles that a man may not be a Judge in his own cause and that no party ought to be condemned unheard or to have a decision given against him unless he has been given a reasonable opportunity of putting forward his case (Halsbury's Laws of England, 2nd Ed., Volume VI, 392)."

The right to be heard before being condemned is, therefore, a vital and fundamental right of an accused person and any procedure that takes away this right from him cannot claim to be based on principles of justice.

As MAHMUD, J., observed in *Pohji's* case (1) cited above :

"There is another maxim which says '*Audi alteram partem*'—the meaning of which is that no one shall be condemned unheard. So at least says Mr. Broom in his celebrated work on Legal maxims. Also there is equally as great an authority, if indeed not greater

(1) (1891) I. L. R. 13 All. 171.

in point of jurisprudence than the authority of that maxim, and it is the saying of Seneca. It is this '*Quicumque aliquid statuerit parte inaudita altera—Aquam licet statuerit, hand acquus fuerit*'. This translated in simple English means, 'Whoever may have decided anything, the other side remain ing unheard, granted that his decision may have been just, will not have been just himself'.

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This is not only poetry but it is sound juristic sense and I think it is the essence of this doctrine which has passed into a maxim, viz. *Audi alteram partem*.

Be that so or not, I know this, speaking entirely for myself again, that it is to me impossible to conceive that any one, no matter how able and conscientious he may be, can with certainty undertake to say that he had arrived at right results in adjudicating upon a quarrel without giving both parties ample and equal opportunities of being heard."

The doctrine of *Audi alteram partem* is the combined wisdom of the East and the West. There is a Persian saying which utters this truth in a more forcible manner than even the words of Seneca. It is more forceful because it not only states the doctrine but combines human experience with it.

The saying is : "*Tanha Pesh-e-Qazi rawi razi ai.*" Translated into English, it means, "Approach the court alone and you will return happy and contented". When section 421, Criminal Procedure Code, empowered the appellate court to dismiss the appeal summarily after perusing the judgment of the trial court and the grounds of appeal alone, and the proviso further empowered the appellate court to dismiss a jail appeal without hearing the appellant, it really advised the appellate courts to pass *ex parte* orders in appeals from jail. The grounds of appeal were construed as equivalent to hearing the appellant against all conceptions of justice and fair play.

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The most important and basic ground taken in almost every appeal filed from jail or through counsel is that the trial court has erred in assessing the evidence. Can this contention be judicially determined by perusing the judgment of the trial court alone? When the contention is that the evidence has been wrongly assessed, should an appellate court get his facts from evidence or from the judgment of the trial court? Do the judgments of the trial court uniformly give a true and complete picture of the evidence produced in the case? As they are judgments of conviction, is it likely or not that the points in favour of the prosecution are stressed and defects are glossed over while the factors in favour of the appellant are slighted, if not completely ignored? This and similar questions arise and every Judge, if he wants to discharge his duties according to the oath which he took, when he assumed office, must put them to his own conscience. Speaking for myself, I can only say that it is impossible for me to accept the findings of the trial court at their face value. I will accept that our Judicial Officers work with honesty and efficiency, but they are human and likely to err. The large number of appeals that are allowed by itself proves that the trial courts not only occasionally, but frequently go astray in assessing evidence. I have not the slightest doubt in my mind that if the jail appeals were not guillotined at the initial stage and the appellate court took the trouble of going into the evidence of the case, in quite a number of cases it would be found that the judgment which seemed very correct on perusal was really insupportable. At least this has been my experience. I, therefore, say it with all responsibility that in my opinion quite a large number of persons are passing their days in jail merely because the High Court dismisses their appeals summarily after perusing the judgment of the trial court alone. This is specially true in dacoity cases. The judgment of the trial court in a fairly large number of cases is really the prosecution brief and it is not possible for any court to adjudicate after perusing such a judgment alone, for it amounts to giving a decision after hearing only one side. Of course, if the courts of law

and justice are meant to live in a world of dreams and make believe, it is different. That is perhaps why in some pictures, justice is painted as blind with a pair of scales in its hands. This, however, is not my conception of justice. In my opinion justice cannot be divorced from truth. The eyes of justice should not only be wide open, but they should possess the power to pierce through the screens of falsehood raised by rival interests.

I am afraid I digressed away from the point which I was discussing. The point was whether the proviso to section 421, Criminal Procedure Code, which deprives the appellant under section 420, Criminal Procedure Code, of a right to be heard is against the fundamental principles of natural justice or not. It cannot be doubted that according to the proviso, an appellant from jail has no right to be heard.

The rule of summary dismissal is, however, explained and justified in some decisions. I will quote extracts from these decisions in support of this procedure. In *Jalam Bharatsing v. Emperor* (1), BEAUMONT, C. J., observed :

“The express reference in the substantive part of section 421 to a petition presented under section 419 or section 420 indicates that the omission of any reference to section 420 in the proviso is deliberate, and that the proviso is only intended to apply to an appeal presented under section 419, that is, an appeal presented direct to the court, and not through the officer in charge of the jail. The legislature may well have thought that it would occasion serious inconvenience and expense to allow every convicted person who desires to appeal from jail the right to come to the appellate court to be heard. We get many appeals from jail, which appear to be based on nothing more substantial than ‘the hope which springs eternal in the human breast’ and it would be a serious matter if all

(1) A. I. R. 1938 Bom. 279.

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such appellants were entitled as of right to insist on being brought at the public expense, often from a jail in a distant part of the Presidency, to Bombay, to argue their appeals."

In the same strain are the observations of WASSOODEW, J., in the same case. WASSOODEW, J., observed :

"It is clear that the proviso to the last section (section 421) deals with appeals presented under section 419, and by the language used, the Legislature has expressly restricted the right of the appellant to be heard to cases under section 419. By necessary implication the right to be heard under section 420, Criminal Procedure Code, has been denied. . . . It may be noted that an argument drawn *ab inconvenienti* has been regarded as forcible in law. In such matters, where convicts from jail frequently apply for permission to be heard in person, the courts have to allow their decision to be determined generally by considerations of inconvenience and public expense."

Another reason justifying the summary dismissal without hearing the appellant from jail is given in a Bench decision of Sind in *Loung v. Emperor* (1). The learned Judges observed :

"... of course the law did not require notice to be given to an appellant actually in prison, under section 420, that would be useless. If an appellant has a pleader, or is able to appear in person, he may be able to give further arguments, but if he is in jail and if he cannot afford a pleader, then issuing of a notice to him is not necessary because he cannot give any further information to the court."

(1) A.I.R. 1927 Sind. 223.

These are the only two decisions to the best of my knowledge in which an explanation for the invidious distinction made between the two classes of appellants is offered. In all the other decisions (and their number is large), only the proviso has been interpreted in the same manner as in the Bombay case cited above, but no attempt has been made to justify this classification.

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I will now examine the reasons given in these two decisions. The first question is whether an appellant can be deprived of the right of defending himself on the grounds of convenience and expense? Can such a basic and vital right be denied on such grounds? Should the convenience of the State be permitted to rob the appellant of his right to defend himself? Are the funds of the State to be considered, but the poverty of the appellant to be ignored? It is a strange irony that this concern for the funds of the State was considered weighty at a time when the wealth of the country was being drained out of the country. The truth as it appears to me is that the alien legislative authority of the years 1861, 1872 and 1882 had slight regard even for the primary and basic rights of their subjects and an administrative method of speedy disposal was created. It is strange that our new democracy permitted this negation of a right to appeal in the case of the appellants from jail to remain on the statute. Is the question of human rights and liberties more important, or the question of a slight increase in the expenditure of the State? I am so far not raising the question of discrimination to which I will come later.

The other argument that jail appeals are inferior appeals and are filed merely as a result of human optimism cannot stand scrutiny even for a moment. With all respect to BEAUMONT, C. J., I think it is the purse of the convict that in the overwhelming majority of cases determines the character of the appeal and not the study in psychology made by him. Can it be maintained seriously that a rich convict does not suffer from this eternal hope and it is only the poor convict who is possessed by it? In my opinion there is not the slightest

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justification for holding that on merits the appeals filed under section 419 are more arguable than the appeals filed under section 420. This expression of opinion is all the more unfair when the jail appeals are not even heard but dismissed summarily.

The explanation and justification offered by the learned Judges of the Sind Chief Court is also quite untenable in my opinion. If I may say so with respect to these Judges, there are some basic fallacies in their reasoning. Firstly, instead of deciding the question in the light of the right of an accused to defend himself, they imported the consideration whether he would be able to do so, if he were given an opportunity and then decided it against him. Convicts go to jail from all walks of life and with all degrees of intelligence. Can it be said that a person who cannot afford a counsel must necessarily be of an inferior intelligence? Can it be denied that some of the prisoners know more about the facts of their case than the lawyers whom they engage? This is specially true in cases of cheating, criminal misappropriation, criminal breach of trust and forgery. Can it be accepted that these prisoners, if they are given a chance, could not point out the misassessment of evidence made by the trial courts? Even in dacoity cases I have been helped by prisoners, who have come before me, for they pointed out to me the incorrect way in which identification proceedings were conducted by the Magistrates. The judgments of the trial courts were absolutely silent on this point. It is, therefore, not correct to say that the prisoner has no information to give to the court. There may not be many prisoners, but there are certainly quite a few who will draw the attention of the court to the relevant factors. Secondly, the learned Judges considered that if the appellant was outside and was able to appear in person, he might be able to advance some arguments. Do the learned Judges mean that the capacity for advancing arguments depends upon the fact whether a person is in jail or outside? Is there any justification for holding that an accused who has been sentenced to a fine only or who is out on

bail can assist the court, but a prisoner who is detained in jail cannot do so, even if he is given an opportunity to appear before the court? I have really not been able to follow the reasoning of the learned Judges.

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I have considered all the reasons given in justification of the rule embodied in the proviso of section 421, but in my opinion there is no valid or just ground for condemning the appellant under section 420 unheard.

My learned brother, Roy, however, relied on the observations of KANIA, C. J., in *A. K. Gopalan's case* (1) to come to the conclusion that even according to the rules of natural justice a prisoner has no inherent right to be heard. He also cited some English and American cases in support of his view. With respect I would like to say that my brother read more in the observations of KANIA, C. J., than they warranted. In my opinion he overlooked the context in which these observations were made. The English and American cases relied upon by him also relate to proceedings before an Administrative Board or Tribunal and not before a court of law and justice. These cases were considered in *Gopalan's case* and so it would not be necessary to examine them separately.

The issue in *Gopalan's case* (1) was not whether a right to appeal includes a right to be heard or not, but whether the procedure laid down in Article 22 of the Constitution of India violates the right given to every citizen of India under Article 21 of the Constitution of India or not. The majority of the Judges who heard that case came to the conclusion that the procedure prescribed in Article 22 comes within the scope of the phrase "according to procedure established by law". They further held that the procedure which is applicable to a court of law does not apply to an Administrative Tribunal and a different procedure may be justifiable for a "preventive" measure as distinct from a "punitive" measure. MUKHERJEA, J., observed at page 249 :

"The word 'preventive' is used in contradistinction to the word 'punitive'. To quote the

(1) 1950 S. C. R. 88.

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words of Lord FINLAY in *Rex v. Halliday* (1) "it is not a punitive, but a precautionary measure". The object is not to punish a man for having done something, but to intercept him before he does it and to prevent him from doing it. No offence is proved nor any charge is formulated ; and the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence."

It was, therefore, held that the right of making a representation given to a detainee under Article 22 (5) of the Constitution of India was sufficient to provide a fair opportunity to him of presenting his case before the Administrative Tribunal.

At page 123 of the same decision KANIA, C. J., observed :

"The Assembly having dealt with the requirements of receiving grounds and giving an opportunity to make a representation has deliberately refrained from providing a right to be heard orally. If so, I do not read the clause as guaranteeing such right under Article 22 (5). An 'orderly course of procedure' is not limited to procedure which has been sanctioned by settled usage. New forms of procedure are as much, held even by the Supreme Court of America, due process of law as old forms, *provided they give a person a fair opportunity to present his case.*"

I have italicized the important words and in my opinion it is in this context that the observations of KANIA, C. J., should be interpreted. The remarks of VISCOUNT HALDANE in *Local Government Board v. Arlidge* (2) relied upon by my brother also points the same way,

(1) L. R. [1917] A.C. 260.

(2) L. R. [1915] A. C. 120.

namely, that the procedure of the courts of law does not apply to proceedings before an Administrative Tribunal. KANIA, C. J., has incorporated these observations in his decision.

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I will now quote the relevant extract from the decision of KANIA, C. J., at page 124 :

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"Again, I am not prepared to accept the contention that the right to be heard orally is an essential right of procedure even according to the rules of natural justice. The right to make a defence may be admitted, but there is nothing to support the contention that an oral interview is compulsory. In the *Local Government Board v. Arlidge* (1). VISCOUNT HALDANE, L. C., in his speech rejected the contention about the necessity of an oral hearing by observing :

'But it does not follow that the procedure of every Tribunal must be the same. *In the case of a court of law tradition in this country has prescribed certain principles to which, in the main, the procedure must conform. But what that procedure is to be in detail must depend on the nature of a tribunal. . . . What appears to me to have been the fallacy of the judgment of the majority in the court of appeal is that it begs the question at the beginning by setting up the test of the procedure of a court of justice instead of the other standard which was laid down for such cases in Board of Education v. Rice* (2). I do not think the Board was bound to hear the respondent orally *provided it gave him the opportunities he actually had.*' "

I have again italicized the important words. As I read them, the view taken by my brother is not supported by

(1) L. R. [1915] A. C. 120.

(2) L. R. [1911] A. C. 179.

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these observations. The following may be deduced from the extract quoted above :

- (1) It may be admitted that the accused has right to defend himself.
- (2) This right of defence need not necessarily be exercised by addressing oral arguments. It can also include some other alternative equivalent by which a fair opportunity is given to the accused to defend himself.
- (3) The rule of an oral address applies to the courts of law only and not to Administrative Tribunals which may have a different procedure.
- (4) So long as a fair opportunity of presenting his case is given to an accused, it does not violate the principles of natural justice.

If the summary given above by me is right, then it is clear that the observations of KANIA, C. J., strongly support the view which I have expressed. A procedure which permits *ex parte* proceedings against an accused obviously gives him no opportunity of presenting his case. If an alternative equivalent to oral arguments had been provided in the Criminal Procedure Code, it could have been argued that it was open to the prisoner to adopt that course. But the Criminal Procedure Code contains no other way of defence except by oral submission. In fact this is the only method recognized by courts of law all over the World. By taking away his right to appear before the court and address it, the status has taken away his right to defend himself. The appeal filed by him from jail cannot possibly be construed as a sufficient and fair opportunity to present his case. The appeal contains at best only contentions and contentions are heads of defence, but no defence. He gets no opportunity to substantiate these contentions by arguments and by drawing the attention of the court to the relevant extracts of evidence.

That the appellant has a right to be heard can also be inferred from the language of section 440, Criminal

Procedure Code. Section 440, Criminal Procedure Code, runs thus :

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“ No party has any right to be heard either personally or by Pleader before any court when exercising its powers of revision. . . . ”

There was no necessity of enacting this section if the right of the appellant to address the court was not conceded. As MAHMUD, J., observed in Pohpi's case (1):

“ First the object of enacting this section would have been wholly unnecessary unless this statute proceeded upon the well-recognized doctrine of law, that wherever there is a right to have a *lis* there is an implied right to be heard, and that this section makes an exception to the general rule. This is a case of *expressio unius est exclusio alterius*. ”

That the appellant has a right to be heard can also be deduced from the observations of the other Judges in *Gopalan's* case (2). I will quote an extract from the decision of FAZAL ALL., at page 166 :

“ In *Local Government Board v. Arlidge* (3) the Local Government dismissed an appeal by a person against whom a closing order had been made under Housing, Town Planning, etc. Act, without an oral hearing and without being allowed to see the report made by the Board's Inspector upon public local inquiry. The House of Lords did not interfere with the order on the ground that the appeal had been dealt with by an administrative authority whose duty was to enforce obligations on the individual in the interest of the community and whose character was that of an organization with **executive** functions. *The principle, however, was conceded and lucidly set forth*

(1) [1891] I. L. R. 13 All. 171, 185.

(2) 1950 S. C. R. 88, 124.

(3) L.R. [1915] A.C. 120.

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when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially, and they must deal with the question referred to them without bias and must give to each of the parties an opportunity of presenting its case, and that the decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. Commenting upon this case, which is generally regarded as an extreme case, Mr. GAVIN SIMONDS, who afterwards became a member of the House of Lords, observes: 'I think you would agree that if the subject-matter of such proceedings as are here indicated was the liberty of the subject, or indeed his life, you would regard such a judicial procedure as outrageous'."

The observations of DAS, J., in *Gopalan's case* (1) are also highly illuminating. He observed at pages 327 to 328:

"But he (counsel for Gopalan) insists on what he calls an effective opportunity of being heard in person before an impartial tribunal which will be free to examine the grounds of his detention and whose decision should be binding alike on the *devenu* and the executive authority, which detains. The claim may be reasonable, but the question before the court is not reasonableness or otherwise of the provisions of Article 22 (4) to (7). Those provisions are not justifiable, for they are the provisions of the Constitution itself which is supreme over every body. The court can only seek to find out, on a proper construction, what protection has in fact been provided. The Constitution has provided for the giving the grounds of detention although facts as distinguished from

(1) 1950 S. C. R. 88.

grounds may be withheld under clause (6) and the right of representation against the order of detention. It has provided for the duration of the detention. There the guaranteed fundamental procedural rights end. *There is no provision for any trial before any tribunal. One cannot import the condition of a trial by any tribunal from the fact that a right of representation has been given.* The right to make representation is nothing more than the right to 'lodge objections' *Clause (5) does not imperatively provide for any oral representation which a hearing will entail.* Indeed the exclusion of the provisions of clauses (1) and (2) negatives any idea of trial or oral defence. The court may not, by temperament and training, like this at all, but it cannot question the wisdom or the policy of the Constitution. In my judgment as regards preventive detention laws, the only limitation put upon the legislative power is that it must provide some procedure and at least incorporate the minimum requirements laid down in Article 22 (4) to (7). There is no limitation as regards the substantive law. *Therefore, a preventive detention law which provides some procedure and complies with the requirements of Article 22 (4) to (7) must be held to be a good law, however odious it may appear to the court to be."*

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It emerges from the extract quoted above that the validity or invalidity of the preventive detention law is to be judged solely on the ground whether the procedure laid down in Article 22 has been complied with or not. There is no trial in such a case and the rules of a court of law do not apply to it. The right of oral hearing, therefore, cannot be claimed . . . by a

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detenu because his case is not governed by the procedure of a court of law. It, therefore, naturally follows that in cases to which the Criminal Procedure Code applies, the accused has a right to be heard for there is no alternative way and this is the only way by which he can defend himself. I am, therefore, of the opinion that the right of an appellant to defend himself by an oral address before a court of law can be inferred from the Supreme Court decision in *Gopalan's* case (1) and any provision of law which takes away this right from him violates the basic principles of natural justice.

That a right to appeal includes a right to be heard was also laid down in a recent Bench decision in *Pitambar Dhondu Patil v. Bhagchand Ratanchand Gujarathi* (2) by the Bombay High Court. The learned Judges observed :

"The petitioner preferred a revision application to the Bombay Revenue Tribunal and the Tribunal had expressed the view that the Collector was not bound to give a hearing to the petitioner before summarily dismissing the appeal. The Tribunal observed that there was no provision under the Bombay Tenancy and Agricultural Lands Act, about the procedure to be followed by the Collector in entertaining and deciding appeals under the Tenancy Act and inasmuch as section 209 of the Bombay Land Revenue Court provided for summary dismissal of the appeals under that Code and further provided that no reasons need be given by Collector when dismissing an appeal summarily, the District Deputy Collector was not bound to give a hearing to the petitioner before summarily dismissing his appeal. We are unable to agree with the view taken by the Tribunal. . . . A right of appeal to the Collector against the decision of the

(1) 1950 S.C.R. 88.

(2) I.L.R. [1956] Bom. 925.

Mamlatdar in those disputes is conferred upon litigants and if that right is to be real and effective we are of the view that the Collector must follow the ordinary rule of procedure followed by the civil courts that if any party is given the right to make an application or appeal to a court he is entitled to be given an opportunity to support the same by oral argument. . . . In any case, the jurisdiction which is conferred upon the Collector as an appellate authority under the Bombay Tenancy and Agricultural Lands Act, is, as we have already observed, jurisdiction to adjudicate finally upon disputes which are essentially of a civil nature, and even if on consideration of expediency the Legislature has entrusted that jurisdiction to the Collector, thereby the nature of the proceedings in which the dispute is litigated is not so fundamentally altered that even the bare right of a litigant to be heard in support of the appeal before his appeal is disposed of should be regarded as excluded. We are unable to agree with the view of the Tribunal that the District Deputy Collector acted properly in dismissing the appeal filed by the petitioner summarily without giving him a hearing."

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I am in entire agreement with the view expressed above and the proviso to section 421 by empowering the appellate courts to dismiss appeals under section 420 without giving an opportunity to the appellants for presenting their case has really deprived such appellants of their right to appeal.

My brother, ROY, has also relied upon certain rules framed by the High Court in support of his conclusions. These are rules 11 and 14 of Chapter XVIII of the High Court Rules, 1952. According to rule 11 a prisoner in jail can pray for personal attendance on the

1957 date of hearing which prayer will not ordinarily be
GOKUL entertained unless it is made sufficiently before the date
v. of hearing so that directions may be issued to the Jail
STATE Officer concerned for making arrangements to present
Mulla, J. the prisoner before the court. Rule 14 lays down that
an appeal from jail should be placed before a Judge for
disposal after the period of limitation has expired. In
the opinion of my brother, these rules remove the distinction
between appeals presented under section 419 and
under section 420, Criminal Procedure Code, as they
give him an opportunity of appearing before the court.
My brother observes :

“ The distinction which is sought to be made out
by the proviso to section 421 is unreal
because in effect the same facilities are
given to the appellants in both categories
of appeals. In jail appeals the appellants
either on account of poverty and, therefore,
unable to engage a counsel, or on account
of any other cause has the opportunity to
pray for personal representation to lay his
view-point before the court and if he does
not avail of that opportunity by making a
specific prayer to that effect, he cannot
later on be heard to say that the proviso to
section 421 makes any distinction in the
case of appeals preferred under section
419.”

I am sorry I am in complete disagreement not only
with the view expressed above, but also with the
approach made by my brother in testing the question
of discrimination. In my opinion the High Court
Rules are absolutely irrelevant in deciding the question
involved. The statute stands by itself and its validity or
invalidity is to be judged on its contents alone. Any
rules framed by the High Court to give effect to the
statute, even if it is accepted that they soften the rigours
of the law (actually they do not), cannot be a considera-
tion in deciding whether the statute is justifiable or not.
The fundamental right of an appellant to be heard

before his appeal is dismissed cannot be subjected to the sweet will of even the High Court Judges. A right cannot be reduced to a mere opportunity which may or may not be given to an appellant in its discretion by an appellate authority. Again, there is no finality in these rules. They exist to-day, but they may not exist to-morrow. These rules may be observed by one High Court and may not be observed by another High Court. Can it be held that the statute is justifiable in one part of the country, but not justifiable in another part? It also escaped the attention of my brother that the proviso to section 421 applies to appeals heard by the District Magistrates and the Sessions Judges also and not only to those appeals which are heard by the High Court. The High Court rules obviously cannot govern the procedure which is to be adopted by these courts in disposing of jail appeals. Even if the High Courts were to treat the proviso to section 421 as a dead letter, and summon every appellant from jail before deciding his appeal, even then this proviso would remain unjustifiable. Unless the statute safeguards a right it cannot be protected by administrative rules.

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These rules are also not relevant to the question which is it to be decided. Rule 11, if I mistake not, can be availed of only by those prisoners whose appeals are not dismissed summarily, but a notice has been issued under section 422. There is no provision in the High Court Rules by which an appellant under section 420 can insist that his appeal be not dismissed summarily till he is given a chance to present his case. I, therefore, do not understand how my brother relies upon this rule to hold that equal facilities are given to all the appellants whether they file an appeal under section 419 or section 420.

As regards rule 14, it is not only irrelevant but in practice there are repeated breaches of the rule. If this rule had been observed, this case would not have come up in appeal before us. This is not a solitary instance, but there are several cases where the High Court office was negligent and the jail appeal was dismissed, although a counsel's appeal was presented within

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Mulla. J. limitation. One of such cases is reported in *Bhawan Singh v. State* (1). It was my brother, Roy himself who decided that case. I will refer to this case again when I will discuss Question no. 4. At this stage I will only point out that in this case the prisoner's appeal filed through a counsel was allowed, although his earlier appeal from jail was dismissed summarily. It is only an illustration of what I have stated earlier that if the jail appeals are not dismissed summarily, quite an appreciable number amongst them would be allowed. Is this alone not sufficient to show that the proviso to section 421 is unjustifiable as it completely guillotines the right of appeal of those unfortunate appellants who cannot afford to engage a counsel?

So far I have only tried to illustrate that the proviso to section 421, by denying the right to be heard, completely throttles the right of defence of the appellants under section 420 and is thus not only a violation of the principles of natural justice, but is also in conflict with the provisions of sections 418, 340 and 440 of the Criminal Procedure Code.

I will now give my reasons why in my opinion section 421 has also to a great extent denied the right of a judicial determination of his appeal to an appellant under section 420.

I have already mentioned the practice that prevails not only in this High Court, but probably in other High Courts also, namely, that no judgment is pronounced in these appeals and only a line is drawn on a printed form, or the single word "Dismissed" is written and the Judge puts his signature under it. This is supposed to fulfil the requirements of a judgment in such an appeal. This tradition was developed ages ago and the present Judges are only following a well-established practice. The words which are interpreted to give this power to the appellate courts are "Dismiss the appeal summarily". To the best of my knowledge there is only one case in which reasons are given why these words should be interpreted in this manner. That

(1) I.L.R. [1956], All. 1

decision is in the case of *Rash Behari Das v. Balgopal Singh* (1). It is a Bench decision and the learned Judges observed :

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"We think that the question really depends upon the meaning of the word 'summarily' in section 421 of the Code. In the absence of that word, there would seem from the Code to be no reason why a judgment is more required in a case where an appeal is heard and dismissed than in a case where it is rejected under section 421, but the word 'summarily' we think differentiates the cases. The word 'summarily' ordinarily means in an informal manner and without the delay of formal proceedings. This, we think, would seem to show that the Judge was entitled to reject the appeal without any formality at all; therefore, without the formality of either a recorded judgment or reasons of any description."

With respect to the learned Judges I have grave doubts about the interpretation given by them. In my opinion the word "summarily" applies only to the method of disposal and not to the contents of the decision. In the context of section 421 a summary dismissal only means that the appeal can be dismissed straightaway without the necessity of issuing a notice to the Government Advocate under section 422. It is open to the appellate court to dismiss it as an *ex parte* petition. This is quite apparent from the opening words of section 422 itself which lays down that notice should be issued if the appeal is not dismissed summarily. I, therefore, feel that for reasons of quick disposal or convenience some extremely questionable foundations were laid and now we have a structure of much more than half a century on these foundations.

There are, however, two circumstances which to a certain extent justify the interpretation quoted above. Firstly, this interpretation was made a long time ago

1957 — and though the Criminal Procedure Code was at least twice amended, once in 1923 and again only two years ago with minor amendments, in between, yet the legislative authority felt no need to make its intention clear that the words "summarily" applied only to the method of disposal and not to the contents of the decision. This at any rate indicates that this interpretation was acceptable to legislative authority. It, therefore, approved it and felt no necessity of formulating any procedure which would make it compulsory for the appellate court to give a judgment, however short it might be, and not merely an order in such appeals. So between the State and the unfortunate interpretation of the word "summarily" given by the old High Courts the poor convict who could not afford a counsel not only lost his right of defending himself but also lost his right of getting a judicial determination of his appeal.

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The second circumstance justifying the interpretation in *Rash Behari's* case (1) is the fact that the appellate court was given the power which was equivalent to a direction to dismiss the appeal summarily even without summoning the record of the case by sub-section (2) of section 421, Criminal Procedure Code. No wonder the Judges thought that if they were neither to hear the appellant, nor to see even the record of the case, it was not expected of them to adjudicate and give a judgment and so they interpreted that the intention of the legislative authority was merely to pass an order in such appeals and that no judicial determination was required. They did not care to import the principles of natural justice and the juristic concept of appeal, in view of the clear direction given in the statute. They realized that they were meant to be only an endorsing authority and not a court of appeal in cases covered by section 420, Criminal Procedure Code. The card for an entry to prison for a convict without means was to be filled in by the trial court and they had only to put their counter-signatures upon it. Their duty was only to see that the trial court made no flagrant mistake in filling the various columns of the card. The very fact that section 421 is never acted upon in appeals, under section 419;

(1) (1894) I. L. R. 21 Cal. 92.

while it is generously applied to appeals under section 420, not only indicates the basic injustice of the rule, but also the difference in the treatment which is extended by the appellate courts to appeals under these two sections.

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Lastly, I will deal with a curious feature of our Criminal Procedure Code. Perhaps this feature does not exist in the Criminal Procedure of any country when the rule of law is based on the principles of justice. In our new amended Criminal Procedure Code a complainant is given a much greater right and opportunity to challenge an order of acquittal than an accused to challenge an order of conviction. The amended section 417, Criminal Procedure Code, runs as follows :

"Sub-section (1)—Subject to the provisions of sub-section (5) the State Government may in any case direct the public prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any other court other than a High Court.

* * *

Sub-section (3)—If such an order of acquittal is passed in any case instituted upon complaint and the High Court on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court,....."

It would be seen that in sub-section (3) the words used are "such an order" which in the context means "an order of acquittal passed either by the original court or by the appellate court". One could have understood that the Legislature wanted to put the complainant on the same level as the accused, if it had confined the right to file such an application against the order of the trial court only. But when it permitted a complainant to file such an application even against the order of acquittal passed by an appellate court, it was giving a right to the

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complainant which was denied to the accused. Formerly both the accused and the complainant could only file applications of revision against the order of an appellate court if they were aggrieved by it under the provisions of sections 435/439, Criminal Procedure Code. That right of the complainant remains, but an additional right to file a second appeal against the order of acquittal passed by the appellate court is now conferred upon him by sub-section (3). An accused at best can have the evidence of the case assessed by two courts only, namely, the trial court and the appellate court, but the complainant is given the privilege of having it assessed by a third court also. He has also been given a right of being heard in support of his application, for there is no provision made for the dismissal of his application after perusing the judgment and the grounds of his application alone. Under section 440, Criminal Procedure Code, the right of an accused to be heard is taken away from him in criminal revision, but the right given to the complainant under sub-section (3) of section 417, Criminal Procedure Code, is not fettered by any such restrictions. It should also be remembered that only those offences which may be described as minor are usually prosecuted by complainants, for in the major offences the State itself becomes the complainant. A complainant in a case under section 323, Indian Penal Code, or some similar offence can now pester the High Court with an oral address even after the appellate court has decided the case against him but the fate of an accused who is sentenced even to imprisonment for life can be decided by a perusal of the judgment alone without giving him an opportunity of presenting his case. If the perusal of the judgment is sufficient for enabling the appellate court to adjudicate, why some similar provision was not incorporated in section 417, Criminal Procedure Code, when dealing with the applications of a complainant under sub-section (3)? One cannot question the wisdom of the Legislature, but one cannot help feeling that while it showed extreme anxiety to protect the complainant from any possible injustice, it did not exhibit even half that concern for the unfortunate prisoner in jail,

whom it first made incapable of appearing before the trial court and then empowered the appellate court to dismiss his appeal in a summary manner without hearing him.

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I am, therefore, of the opinion that the proviso to section 421, Criminal Procedure Code, is unjustifiable for it reduces an appeal under section 420, Criminal Procedure Code, to a farce and mockery and is also in clear conflict with the provisions of sections 418, 340 and 440, Criminal Procedure Code.

So far I have only stressed the fact that the proviso to section 421, Criminal Procedure Code, is unjustifiable, but even the most odious and atrocious enactment has to be carried out by the courts of law so long as it remains on the Statute. The Legislature is supreme within the frame-work of the Constitution of India and howmuch-soever the courts might be shocked by a particular statute or provision of procedure, they cannot but enforce it. As admitted by me in the very beginning, the right to appeal is not an inherent right and can only be conferred by statute. The Legislature in its wisdom can take away this right altogether and the courts will have to hold that there is no right to appeal. It is only the rising consciousness of the people which can control and check the vagaries of the Legislature. The Legislature is, however, not absolutely supreme and Article 245 (1) of the Constitution of India limits its powers. The laws must be made subject to the provisions of the Constitution. If, therefore, any law transgresses this limit, the courts not only can but must step in to put back the Legislature within bounds. The Constitution has offered some basic rights and liberties upon all citizens and amongst them is the right of "equality before the law" and "equal protection of the laws" (Article 14). If any law makes an unjustifiable discrimination it becomes *ultra vires* of the Constitution because it violates this right.

It is true that for attaining equal protection of the laws it is not possible to lay down a precise formula, for the State when framing statutes has to deal with an

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infinite variety of relations and circumstances and perfect equality before the law will always remain a dream. The Legislature must be allowed a fair latitude of discretion and judgment which is based on innumerable and complex considerations. The law, therefore, cannot escape from classifications. But where such a classification cannot be supported on any reasonable basis, where it offends the fundamental principles of natural justice and where it has no understandable link with the objective, it clearly amounts to an unjustifiable discrimination as it denies equality before the law to a group. In the words of DAS, J., in the *State of West Bengal v. Anwar Ali Sarkar* (1) :

“The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.”

Does the proviso to section 421 fulfil the test mentioned above? Can there be any reasonable basis for granting the right of addressing the appellate court personally to appellants under section 419, Criminal Procedure Code, and refusing this right to appellants under section 420, Criminal Procedure Code? Has this classification any intelligible relation to the object sought to be achieved? Is this classification in the ultimate analysis not a classification on the basis of wealth. Has the equality before the law not been denied to those who do not possess

(1) 1952S. C. R. 284, 334.

means to engage a counsel? I will now proceed to give my answers to the question raised.

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That the proviso made an invidious distinction between appellants under section 419 and appellants under section 420, Criminal Procedure Code, was commented upon by MAHMUD, J., in *Pohpi's* case (1) as early as 1891. He observed at pages 179-180 :

"I had some difficulty in understanding the proviso in this section (421), but that difficulty has been removed by the learned argument addressed to us by *Mr. Hill* (counsel for the State). It must, on the maxim of interpretation *expressio unius est exclusio alterius*, I am afraid, be taken that this proviso is limited to appeals which have not been presented from the jail, and therefore a man in jail, whilst on the one hand he has the privilege of presenting his appeal in the manner which section 420 prescribes, on the other hand he has not the privilege of insisting that he should be heard, or even his pleader, if he retains one, after sending up an appeal from the jail.

I have no doubt that, for purposes of summary rejection of appeals, this proviso to section 421 is helpful to the cause which *Mr. Hill* has undertaken to advocate, namely that the presence of the prisoner-appellant is not necessary as a condition precedent to the action of the court in rejecting such appeals summarily. I do not wish however to dwell upon this aspect of the case, nor upon the somewhat invidious distinction which the Legislature in its wisdom has thus thought fit to draw. I do not do so because these five appeals were not summarily rejected."

When MAHMUD, J., made these observations, Article 14 of the Constitution did not exist. In those days a law could not be challenged on the basis of inequality and

(1) (1891) I. L. R. 13 All. 171.

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invidious distinction. It is not difficult to infer from the extract quoted above that in the opinion of MAHMUD, J., the proviso created an unjustifiable inequality.

It cannot be seriously disputed that the proviso creates with different rights and privileges. A three-fold classification has been made amongst the group of appellants :

- (1) Those convicts, whether in jail or outside, who present their appeals through a counsel.
- (2) Those convicts who are not in prison and who elect to file an appeal personally without engaging a counsel. This group included those who are awarded a sentence of fine only and so they can appear before the appellate court.
- (3) Those prisoners in jail who cannot appear before the court personally and either cannot or do not engage a counsel, but send their appeals from prison through the jail authorities.

The right to be heard before the summary dismissal of their appeals of the first two classes has been safeguarded by the proviso. But this right has been denied to the third group. Is there any reasonable basis for this discrimination? A person who is sentenced to a fine of a few rupees is entitled to be heard, but a person who has been sentenced to imprisonment for life need not be heard. But if he means to engage a counsel, he immediately gets this right. A prisoner may be quite competent to defend himself but he must spend money by engaging a counsel if he wants to be heard. The privilege does not depend upon the merit of his case, but on the length of his purse. A right has been turned into a luxury. Does it not show that the statute, as it stands, confers rights and privileges on men of means, while it deprives the poor men of those rights? Is this not in essence a classification on the basis of wealth.

In the words of Jenning (Jenning's Law of the Constitution, 3rd Edition, page 49) equality before the law means :

"The right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be the same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status or political influence."

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I may be forgiven if I resort to an analogy to illustrate the discriminatory nature of the impugned proviso. I am giving this analogy in the form of rules. Here is the analogy :

- (1) All citizens will have an equal right to worship at a temple inside a public park with the permission of the priest, who is in-charge of the temple.
- (2) The park will have two gates, one on the eastern side and one on the western side.
- (3) Citizens can approach the gates of the park either on foot or on conveyance.
- (4) There is a conveyance stand near the eastern gate and all citizens can take conveyances on hire from there.
- (5) Citizens on conveyances, whether hired or their own, will enter by the eastern gate and those on foot can enter only by the western gate.
- (6) The gateman on the eastern gate will permit all those who come on conveyances to enter the gate and he will not stop them. These conveyances will go up to the door of the temple where those citizens who have come on conveyances will get an opportunity of approaching the priest and seek his permission to worship at the temple.
- (7) The gateman on the western gate may in his discretion after perusing a vagrancy report stop any of the pedestrians from entering

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the park without giving any reasons and without giving him any opportunity of offering any explanation.

The appellant under section 420, Criminal Procedure Code, is the poor pedestrian who had no means to hire a conveyance and so he had to approach by the western gate. An extra barrier was erected against him, because he could not hire a conveyance to enter the park and approach the priest of the temple. While those who reach the priest on conveyances, a fair chance to secure his permission, the poor pedestrian has no better than a dog's chance. The gate-keeper of the western gate does not want to add to the crowd in the park which is already over-filled and as it is easy to stop the pedestrian from entering, he succumbs to the temptation. The difference in the treatment meted out to the two groups is obvious. The pedestrian could not interview the priest, because he had no money to hire the conveyance.

It cannot be doubted that the dominant reason why a prisoner files an appeal under section 420 and not under section 419 is his incapacity through lack of means to engage a counsel. EDGE, C. J., in *Phopi's* case (1), when disagreeing with MAHMUD, J., observed (page 187) :

"My brother MAHMOOD apparently thinks that persons who have been convicted and have appealed are hardly treated, if their appeals are disposed of in their absence. He has suggested that the Code of Criminal Procedure cannot contemplate the disposal of an appeal without the hearing of the convicted person in person or by a pleader, when the convicted person is by reason of the sentence, which was passed upon him, prevented from personally attending. It must be observed that it is in the power of any convict, if he has means, to be represented before the appellate court by a pleader. If he has not the means to instruct a pleader to represent him, he is not in any way in a

(1) (1891) I. L. R. 13. All. 171.

worse condition than a convict who has been released on bail, pending his appeal, and through want of means is unable to attend at the hearing of his appeal, or to instruct a pleader to represent him."

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I will not express my opinion about the analogy given by Sri JOHN EDGE, C. J., for I have quoted this extract only to substantiate that ostensibly no classification has been made on the basis of wealth, but in essence and in effect the division of appeals under section 419 and section 420, Criminal Procedure Code, is a classification of rich and poor. My brother in his judgment has accepted that poverty is one of the reasons why the prisoner files an appeal under section 420, Criminal Procedure Code. To the same effect are the observations of the learned Judges in *Loung v. Emperor* (1), when they observed that an appellant under section 420 probably could not afford a lawyer. Where a classification is made on the basis of a person being able to engage a lawyer or not, I am of the opinion that in essence it is a classification of wealth.

The counsel for the State contended that it is the individual's choice whether he engages lawyer or not and so this grouping cannot be called a classification of wealth. Where does the choice arise when the poor convict has no means to engage a counsel? It would have been a matter of choice if a free counsel was available to him. The classification of prisoners with different rights and privileges on the ground of their engaging a counsel or not is really a grouping on the basis of their capacity and ability to engage a counsel and it thus becomes a classification of wealth.

I am, therefore, of the opinion that the proviso to section 421, Criminal Procedure Code, as it stands, is not only a discriminatory piece of enactment which has deprived an appellant under section 420 of valuable rights which have been given to appellants under section 419, but in its effect it has also made such a classification which favours the rich and punishes the poor. The

(1) A.I.R. 1927, Sind. 223.

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basic direction of the proviso recognizes a well-established rule of natural justice, but by including the words "presented under section 419" it has created an inequality which has no justifiable basis. It is these four offending words which violate Article 14 of the Constitution and are thus *ultra vires* of the Constitution of India. In my opinion the doctrine of severability applies and these four words should be severed from the proviso and it should be read without them.

My answer to the first question, therefore, is that the inclusion of the words "presented under section 419" have made the proviso unjustifiable and *ultra vires* of the Constitution of India, but these words can be severed from the proviso which after this deletion becomes a salutary rule of law.

I will now take up question no. 2 and question no. 3 together, for they are really parts of the same question. *Question no. 2*—Has the High Court any power to admit and hear a second appeal filed through a counsel after the first appeal filed by the prisoner from jail has been summarily rejected under the proviso quoted above?

Question no. 3—Can it be said that the judgment of the High Court is not delivered until the seal of the High Court is affixed to such a judgment?

I am in agreement with the conclusion reached by my learned brother on these two questions, but for different reasons. My answer to both these questions is also in the negative.

The practice that prevails in our High Court is mentioned by a learned Judge in *Lachhman Chamar v. Emperor* (1). It is as follows:

"The practice in the High Court is that a summary dismissal of a jail appeal by a learned Judge does not in any way debar the hearing of an appeal filed by counsel. Indeed, the fixing of the seal is delayed till the period of limitation is over."

(1) A.I.R. 1934 All. 988.

Incidentally this practice only indicates the resistance of the judicial mind to accept the unjustifiable rule of procedure laid down in the proviso to section 421 in respect of appeals filed under section 420. It was repugnant to the High Court to condemn a person unheard if there was someone to plead on his behalf. This practice was, therefore, adopted in the interests of equity and justice. The High Court created two fictions in order to get round the proviso. It first interpreted sections 419 and 420 to mean that two rights of appeal have been given to a prisoner and, therefore, the summary dismissal of his jail appeal was only a provisional dismissal and not a final adjudication. Secondly, it adopted the device of keeping the order of summary dismissal unsealed till the period of limitation for filing an appeal had expired, introducing thereby the fiction that an order is not delivered until it is sealed and up to that time it remained only a draft which could be changed. How much soever laudable and equitable these intentions might be, the law is clearly against this procedure and none of the two premises is sound. The Criminal Procedure Code gives only one right of appeal to all convicted persons and this right is given under sections 408 and 410, Criminal Procedure Code. Sections 419 and 420 only prescribed the two different methods of appeal open to a convicted person. They cannot be construed to mean that two rights of appeal have been conferred on prisoners. If a prisoner adopts both the methods for filing his appeal, they may be numbered separately in the High Court registers, but for the purpose of disposal they are one, for a merger takes place and a final order cannot be passed in one by keeping the other pending. The conception of a double right of appeal is basically repugnant to the administration of criminal justice. It cannot possibly be contemplated that the same court should adjudicate on the same matter twice, for such a course would immediately destroy the sanctity and the finality of a judicial order. Justice should create confidence and if the same court was allowed to change a duly passed order after reconsideration, this confidence would be shattered. It is only by exercising its inherent power of

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review to secure the ends of justice that a duly passed order can be reopened. This power of review could have been exercised by the High Court under section 369 of the Code of 1882 and in the existing Code it can be exercised under section 561-A. The first order can be set aside only in the interests of justice, but it cannot be treated as a provisional order which can be amended. Where a court is required to adjudicate on merits and for some reason it refuses to do so on the first occasion, it cannot cover up its initial wrong by doing another wrong and treating the first order as a nullity. The real remedy lies in not passing the first order in an hurried manner and if it is to be corrected, the correction should be done in the manner prescribed by law and not by a subterfuge or device.

Perhaps the High Court had to adopt this procedure in the interests of justice and equity, because according to the weight of legal decisions, section 369 of the old Code did not confer any power on the High Court to review its own decision on the criminal side, if such an order was passed in a criminal appeal or a criminal revision. This view, in my opinion, was not sound, but I will deal with it later.

Similarly, the sealing of the judgment is no part of the delivery of the judgment. In the majority of cases the High Court pronounces its judgments in open court immediately after hearing the arguments and after these judgments are typed out, they are signed by the Judges concerned. In the case of judgments which are reserved, the Judge pronounces them when they are ready in open Court and then puts his signature and the date upon it. Can it be said that the order was not made final at that stage and that it is open to the Judge to change his mind and alter the decision because up to that time the seal of the High Court has not been affixed to it? Is the period of limitation calculated from the date which the judgment bears or from the date when the seal is affixed to it? The sealing of the judgment is merely a proof of its authenticity and as such it is only a matter of administrative routine and has nothing to do with pronouncement of the judgment.

I have not referred to any case-law in connection with these two questions because my learned brother has fully dealt with it in his decision.

I now come back to the question whether a review was permissible under section 369 of the Code of 1882 or not. In my opinion even under the old Criminal Procedure Code of 1882, before it was amended in 1923 and before section 561-A was enacted, the High Court instead of resorting to these fictions could have exercised its power of review. Section 369 of the 1882 Code runs as follows :

"No court other than a High Court when it has signed its judgment shall alter or review the same except as provided in section 395 or 484 or to correct a clerical error."

The words of the section clearly indicate that the High Court possessed extensive powers of review which were not given to the other courts. In the report of the Joint Committee of 1922 the reason for amending section 369 contains the following sentence :

"The wording of the old section admitted of the interpretation that High Court has unlimited powers of altering or reviewing their judgment."

It was really to curtail and clarify these powers of review which in the old Code were capable of being interpreted as unlimited that section 369 was amended and the new section 561-A was added. An order of summary dismissal, therefore, could have been reviewed to secure the ends of justice. I am aware of a large number of decisions including several Full Bench decisions in which it was held that the High Court did not possess this power. Surprising as it may seem, the normal way of interpreting a statute, which consists of giving its natural meaning to words, was not adopted in any of these cases and on extraneous considerations it was held that the High Court had power to review its decision on the criminal side under section 369. To the best of my knowledge there is not a single decision in which the principles of law or equity were discussed. For some unaccountable reason the Calcutta Full Bench came to the conclusion that section 369 of

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the Criminal Procedure Code did not give a power to review a decision of the High Court on the criminal side and this was followed by the other High Courts. That the view was incorrect is apparent from the extract of the report of the Joint Committee, which I have cited above. The Legislature felt the necessity of amending the section because it was capable of an interpretation that unlimited powers of review have been conferred upon the High Courts, yet the High Court by a strange self-denying ordinance held that they had no power to correct even a palpable and grave injustice.

The practice that prevailed in our High Court was based upon a well-recognized maxim of equity. Unfortunately no reference to it was made in any of the decisions in support of this practice. Perhaps the Judges thought this way simpler and instead of disagreeing with the prevailing view and openly admitting that they were reviewing the first order, they took up the stand that the first order was only a draft as it was not sealed. The maxim of equity to which I have referred is "*actus curiae neminem gravabit*". In simple English it means, "An act of the Court shall prejudice no man". Therefore, where the right of the appellant to be heard was denied to him because of the fault committed by the court itself, the least that the court could do was to rectify its own error by reconsidering the case. Where a jail appeal was dismissed summarily, although the appellant had also filed an appeal through a counsel within limitation, it was clearly the negligence of the High Court Office that the two appeals were not connected together. The negligence of the High Court office was an act of the court which resulted in prejudice being caused to the appellant and, therefore, on the basis of the principle of Equity cited above it was a fit case in which the High Court should have exercised its power of review. Unfortunately the High Court did not approach the question from this angle. It seemed to have ignored that the High Court is also a Court of Justice and not merely a Court of Law and the Judges of the High Court possessed inherent powers to function as Courts of Justice. This

matter has been clarified by the addition of section 561-A in 1923, but I will deal with this point in my answer to question no. 4.

My answer to the two questions which I am discussing is, therefore, in the negative. In my opinion (1) the order of summary dismissal under section 421 is a final adjudication and no second appeal can be admitted or heard, only a review under section 369, according to the Code of 1882, was entertainable, and, according to the existing Code, only an application under section 561-A, Criminal Procedure Code, can be entertained against such an order, and (2) the affixing of the seal is no part of the pronouncement of the judgment, which is final as soon as it is delivered in Court and signed.

I now come to the last question.

Question no. 4—Can the High Court review its own judgment under section 561-A, Criminal Procedure Code? My learned brother has answered this question in the negative, but I am again unable to agree with him.

I will first give the circumstances in which section 561-A was enacted. I have already reproduced section 369, as it existed in the Code of 1882. I have also mentioned the opinion of the Joint Committee of 1922 regarding the interpretation of the words of this section. It is, therefore, not only surprising, but inexplicable to me why all the High Courts were of the opinion that they were helpless to review an order passed by a Judge of the High Court on the criminal side even though they felt that it was an unjust order. All the High Courts were unanimous that the order of a High Court Judge when functioning in his appellate or revisional capacity could not be reconsidered and section 369 did not empower them to review it. This was specifically mentioned in several cases. I will quote only one extract from *Kunhammad Haji*, (1). DEVADASS, J., observed :

“The third point argued is that the High Court has power to review an order passed in a criminal matter. I think this is concluded by authority. The earliest case on the

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(1) (1923) I.L.R. 46, Mad. 382. 403.

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point is *Queen v. Godai Raout* (1). A full Bench of the Calcutta High Court presided over by Sir BARNES PEACOCK held that the High Court could not entertain an application to revise a judgment passed by it in a criminal case. The learned Judge observed at page 63 : 'The Code of Criminal Procedure does not contain any provision expressly authorizing a review of judgment in a criminal case after the judgment has been recorded. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a section expressly authorizing review of judgment, but the former contains no corresponding section. From this it may reasonably be inferred that the Legislature did not intend to confer in criminal cases a power similar to that which they had given in civil cases. Now the Code of Criminal Procedure has been amended a number of times, and the Legislature has not chosen to give a power of review to any court in a criminal case. Section 369 is relied upon as showing that the High Court has power by implication to review a judgment passed in a criminal case. I think such a contention is untenable. Section 369 runs thus :

'No court other than a High Court, when it has signed its judgment shall alter or review the same, except as provided in sections 395 and 484 or to correct a clerical error.'

The exception contained in section 369 is with reference to the power of review in regard to cases decided by a Judge of the High Court presiding over the Sessions when points are reserved for consideration by the Full Bench or on the certificate of the

(1) (1866) 5 W.L. (Cal.) 61.

Advocate General. *Queen Empress v. Durga Charan* (1), in the matter of *Gibbons* (2), *Queen Empress v. C. P. Fox* (3) are all authorities for the proposition that a Division Bench of the High Court has no power to review its judgment pronounced in a criminal revision case or a criminal appeal."

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It is really surprising that the words of section 369 of the Code of 1882 were not given their natural meaning, but the contrast between the Civil Procedure Code and the Criminal Procedure Code was made the basis for holding that section 369 conferred no powers of review and was almost a dead letter. The Madras decision cited above was given in October, 1922. It, therefore, seems very probable that section 561-A was introduced by the amending Act of 1923 to tell the High Courts that the Legislature does not understand their wail of helplessness for they possess inherent powers, apart from the powers conferred upon them by the Criminal Procedure Code and that in the exercise of these inherent powers they can act as a court of review on the criminal side also in such cases where flagrant injustice had resulted or was apprehended. Section 561-A did not confer any new powers, but reminded the High Courts that they are invested with certain inherent powers and they can use them in the interests of justice.

I will now quote sections 369 and 561-A of the Code of 1923 :

Section 369—Save as otherwise provided by this Code or by any other law for the time being in force or in the case of a High Court established by Royal Charter by the letters patent of such High Court no court when it has signed its judgment shall alter or review the same except to correct a clerical error.

Section 561-A—Nothing in this Code shall be deemed to limit or affect the inherent

(1) (1885) I.L.R. 7, All. 672.

(2) (1887) I.L.R. 14, Cal. 42.

(3) (1886) I.L.R. 10, Bom. 176.

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powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

In the statement of objects and reasons for introducing section 561-A it was stated :

“By this section it is proposed to give statutory recognition to the inherent powers of the High Court a principle which is already well-recognized.”

The principle might have been well-recognized but the High Courts themselves were either not conscious of these inherent powers or for some reason they were not willing to exercise them so long as a statutory recognition of these powers was not made. Section 561-A, therefore, made that statutory recognition and reiterated that the High Court is also a Court of Justice and in its inherent powers it can correct any error committed by a court, if it is necessary in the ends of Justice. In other words the new amended Code told the High Courts that if they did not correct flagrant cases of injustice earlier, they failed to do so not because there was any lacuna in the law, but because they did not exercise their inherent powers. Attention was, therefore, focussed on these powers by enacting section 561-A. The High Courts felt helpless to unravel the knots which they themselves had tied wrongly and they wanted the Legislature to give them some specific instrument to do so but the Legislature replied, “Your fingers are blessed with nails. Why don't you use them.”

Section 561-A has been interpreted in two ways by the High Courts. These two views are given in Sarkar's Criminal Procedure Code, 1956 Edition, at page 939. The paragraph is as follows :

“One view is that there is no inherent power in the High Court to review its own judgment once pronounced except in cases (i) where it is passed without jurisdiction or (ii) in default of appearance without adjudication

on merits or (iii) to correct a clerical error. The other view is that the words 'Save as otherwise provided by the Code' in section 369 permit a review of the court's own order when it is found necessary to secure the ends of justice."

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The amending Act of 1923 has clearly made two changes. In the first place it greatly restricted the power of review which existed in the old Code under section 369. At the same time it made a statutory recognition of the inherent powers of the High Court which were above the restrictions placed on the right of review given in the amended section 369. The wide and extensive power of review given under section 369 of the old Code was taken away, but it was accepted that for the purposes mentioned in section 561-A, the High Court could exercise its inherent powers of review. The opening words of sections 369 and 561-A made that position absolutely clear. The opening words of section 369 "Save as otherwise provided by this Code" unambiguously indicate that a power to review is provided in another part of the Code. The opening words of section 561-A, "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court" equally proclaim that these inherent powers are supreme and they cannot be fettered by the limitations placed in section 369. The purposes for which these powers can be used are also clearly mentioned in section 561-A. One of the purposes is "to secure the ends of justice". The words of section 561-A place only one limitation on the exercise of these inherent powers to attain this end. That limitation is that these powers should only be used when it is "necessary". In my opinion the word "necessary" imposes three conditions :

- (1) The relief sought is not available to the aggrieved applicant under any other provision of law.
- (2) The injustice which is sought to be corrected is not of a questionable or an indefinite character but is clearly perceptible and definite.

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- (3) The injustice is not of a trivial or minor nature, but is definitely of a grave character.

If these three conditions exist, the High Court being a Court of Justice can exercise its inherent powers and review any order passed by any court which has occasioned injustice. I am, therefore, of the opinion that out of the two views mentioned in the extract from Sarkar's Criminal Procedure Code, it is the second view which is a correct interpretation of section 561-A. This view is supported by a Bench decision of our High Court in *Sri Ram v. Emperor* (1). MALIK, J., observed :

"Section 369 begins with the words 'Save as otherwise provided by this Code,' and we consider that under section 561-A, where this Court is satisfied that it is necessary, to secure the ends of justice, that it should interfere under its inherent powers, it ought to do so."

There are some other decisions also in which the same view has been expressed, but I need not cite them. Amongst these decisions is a decision of my learned brother in *Bhawan Singh v. State* (2). The rule of law laid down in *Sri Ram v. Emperor* (1) was acceptable to him in that case, but it seems that on deeper consideration he has changed his view.

This view is based on two premises :

- (1) The Criminal Procedure Code confers no power of review under section 369. Reliance is placed on a large number of decisions.
- (2) Section 561-A confers no new powers which do not exist in the Code. It, therefore, does not add to the powers of the High Court.

It will be seen that in this line of reasoning the inherent powers of the High Court to secure the ends of justice are ignored. If the High Court possessed inherent powers to give effect to an order which could be passed under the Criminal Procedure Code alone and not to set right

(1) (1947) 45 A.L.J. 485, 485.

(2) I.L.R. [1956], All. 1.

an injustice irrespective of the Code, the words of section 561-A would have been different. The language of section 561-A clearly shows that apart from giving effect to orders which can be passed under the Code, the High Court can also make orders to prevent abuse of the process of any court or otherwise to secure the ends of justice. In my opinion the basic error in this view is that according to it power of review can come only through some provision of the Criminal Procedure Code and not through the inherent powers possessed by the High Court. It interprets section 561-A in the same manner as section 369 of the old Code was interpreted by the earlier Judges and which was responsible for the enactment of section 561-A. Just as the words in section 369 of the old Code were not given their natural meaning, similarly the clear language of section 561-A is being ignored and the absence of a provision like section 114 of the Code of Civil Procedure from the Criminal Procedure Code is advanced as a reason for holding that the High Court has no power to review on the criminal side.

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There is a fundamental difference between the civil law and the criminal law. In civil law a review is recognized as a normal and regular part of procedure. It was, therefore, necessary to incorporate this power specifically in the Civil Procedure Code. The criminal law does not recognize a review except in very limited circumstances mentioned in section 369. It is an extraordinary procedure, which can be resorted to by the High Court alone in the exercise of its inherent powers in order to secure the ends of justice. It could not be mentioned in the Criminal Procedure Code because it was an exceptional procedure, which was to be adopted by the High Courts alone and no other court and that too in the exercise of its inherent powers. It was for this reason that the general power of review was reduced to almost a nullity under section 369 and a statutory recognition of the inherent powers of the High Courts for the purposes specified in section 561-A was made. The main reason why the Calcutta Full Bench in *Queen v. Godai Raout* (1) held that the High Court has no power to

1957 review its own decision was that they placed the High
Court on the same footing as the other criminal courts.
They observed at page 62 :

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"That Regulation did not give the lower courts the power of reviewing their own judgments on the grounds therein mentioned. The power was conferred upon the Nizamut Adawlut alone. But if this Court has power to review a judgment under the Code of Criminal Procedure the lower courts must have that power also."

This again indicates that they were searching for this power in the provisions of the Criminal Procedure Code and ignoring their inherent powers. This explains why the Legislature, when it amended the Criminal Procedure Code in 1923, introduced section 561-A separately so that it may be made perfectly clear that this power cannot be exercised by any other court and it is the High Court alone who can exercise it when it finds it necessary in the ends of justice.

I need not delate on the last point, namely, that where a party is injured by the act of the court itself, it is imperative in the interests of justice that the court should rectify its own mistake. I have already cited above a maxim of equity which is fully applicable to such a case. It is difficult to imagine a case of greater injustice and if in such a case section 561-A does not apply then the High Court might as well be deprived of its inherent powers.

My answer to this question is, therefore, in the affirmative.

In view of my answers to question nos. 1 and 4, I am of the opinion that this appeal is still pending and it should be decided on merits after hearing the counsel for the appellant.

Having disposed of the points of law referred to the Bench, I now proceed to decide the case on its merits.

Appellant Gokul has been convicted under section 395, Indian Penal Code, and sentenced to five years' R. I. by the Sessions Judge, Pilibhit.

The prosecution story is that an armed dacoity was committed at the house of Salik Ram, a resident of village Ladpur, police station Bisalpur, district Pilibhit, on the night between the 22nd and 23rd of July, 1953. The time of the dacoity is mentioned as 11 p.m. The dacoity was thus actually committed on the night of the 22nd of July, 1953. About 18 or 20 dacoits some of whom possessed fire-arms came to the house of Salik Ram who lived with his brother, wife and other relations. Salik Ram was sleeping in a *sidari* and it is alleged that a lantern was burning there. Salik Ram was awakened by the sound of some foot-steps and feeling apprehensive, he awakened his wife who was sleeping near him. He also called out to his brother Balak Ram who was sleeping in another part of the house. He then took up a torch and went to the outer door and when he flashed the torch, he saw about 15 or 20 persons who were armed with various weapons. One of the dacoits began to assault Salik Ram, upon which an alarm was raised. Salik Ram's wife and Balak Ram rushed up to save him but the dacoits began to beat Radhika Devi also, the wife of Salik Ram. They coerced her and forced her to deliver the bunch of keys. The dacoits then entered the house and after collecting the looted property, which was considerable as it was worth more than Rs.12,000, went back. Meanwhile on hearing alarm of Salik Ram and the other inmates of his house, the neighbours had collected and some of them came with torches. When the dacoits went out, they fired their guns and then ran away in a group. The witnesses, however, saw the dacoits leaving the house in the light of the torches which were flashed by them and by the dacoits. Three dacoits were recognized, and they were Debi Murao of Barhepur, Ghatam and Chitna Kurmi of Amrita. The third dacoit recognized was not known by name but this was known that he was a Kahar, who lived in Amrita.

Next morning, Salik Ram went and lodged the first information report at police station Bisalpur which was five miles away. This report was lodged at about 10 a.m. In this report the three dacoits who were recognized were named and a list of the looted property was also submitted. This report was lodged in the absence of Sri Krishna

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Pal Singh, the Station Officer. Sri Krishna Pal Singh however, started the investigation of the case two days later. He prepared a site-plan and took the search of the two persons named in the first information report. Nothing was recovered from the possession of these two persons. He, thereupon, took no action against them and did not prosecute them. Before he could finish the investigation he was transferred and Sri Tyagi came in his place. In the course of investigation, several suspects were arrested and the appellant was arrested as late as the 24th of December, 1953. As the suspects were arrested at different times, three identification parades were held. The first parade was held on the 24th of November, 1953, and the parade in which the appellant was put up was held on the 13th of March, 1954. A third parade was held on the 3rd of April, 1954. The suspects were satisfactorily identified and after completing the investigation, Sri Tyagi submitted the charge-sheet against eight accused persons.

The Committing Magistrate discharged three of these accused persons and committed the remaining five to stand their trial before the Sessions Court. The trial court again acquitted three of the accused persons and convicted only the appellant and one Ram Prasad. Ram Prasad has not filed any appeal. Only the appellant sent his appeal from jail and later on filed a second appeal through a counsel.

It would be seen from the facts mentioned above that the case against the appellant rests on the evidence of identification alone. In the jail parade held on the 13th March, 1954, the appellant was identified by no less than five witnesses. They are P. W. 2 Baldeo, P. W. 3 Hori, P. W. 4 Umrao, P. W. 19 Salik Ram and P. W. 21 Srimati Radhika Devi. The trial court rejected the evidence of Umrao and Hori, but accepting the identification of the other three witnesses convicted the appellant.

In every case of dacoity in which the case rests on the evidence of identification alone, the first question to be determined is whether there was ample light for the witnesses to see the features of the dacoits. According to the prosecution case, a lantern was burning in the house

of Salik Ram and Salik Ram also possessed a torch. It is also alleged that the dacoits carried torches and some of the witnesses who came also flashed their torches. It also appears that if the dacoity was committed at the time alleged by the prosecution, then there would be a fading moon in the sky. It is in this light that the witnesses got an opportunity of seeing the features of the dacoits. It seems to me that in view of this light, it cannot be said that the witnesses had no opportunity of seeing the dacoits. The evidence, however, discloses that when the dacoits came out of the house, they fired some gun-shots and then ran away in a group. I am, therefore, of the opinion that while the inmates of the house had a fair opportunity of seeing the dacoits, those who were outside might have by a mere chance caught the faces of some dacoits in an accidental flash of the torch, but they did not possess a good opportunity of seeing the dacoits. It is not easy to accept that where dacoits go out of the house after firing gun-shots, the witnesses would be flashing their torches towards the dacoits. Flashing a torch in such circumstances is issuing an invitation to a bullet. I am of the opinion that such invitations are not recklessly issued. The site-plan prepared by the investigating officer also shows that at the time when it was prepared the place where the witnesses had assembled was not disclosed but later on the investigating officer realizing this omission fixed upon a place and fabricated an entry at no. 8 of the index of the site-plan. I am, therefore, of the opinion that only the inmates of the house had some opportunity of seeing the dacoits.

The defence of the appellant was that he was shown to the prosecution witnesses after arrest. He stated that he was detained in the Katra thana for two or three days where he was shown to the witnesses. He was then sent to Shahjahanpur by train and the prosecution witnesses also travelled by the same train. He also alleged that he was shown to the witnesses at Bisalpur Railway Station which he passed in the way. He also contended that he was on inimical terms with Salik Ram, who knew him from before.

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The evidence of identification even at its best is a weak type of evidence and it is accepted in those cases where the investigation inspires confidence. In those cases where there are not only good reasons to doubt but it seems very probable that the investigation is highly tainted, the evidence of identification possesses very little evidentiary value. The trial court made the following observations about the nature of the investigation conducted by Sri Krishna Pal Singh in this case :

"It is with regret with stern regret that I note that the S. I. Sri Krishna Pal Singh did not investigate this case properly. He did not challan the two dacoits whose names are mentioned by the complainant in the First Information Report. They are Debi Murao, resident of Brahaipura Ghatam and Chinta Kurmi residents of Amrita. There was no justification for the S. I. not to prosecute these two persons. The S. I. Sri Krishna Pal Singh stated that he took the search of Debi and Chinta but no property was recovered from them. This can hardly be any reason for not challaning the two accused. No property has been recovered from the possession of any other accused in this case. In the statement of Salik Ram under section 162, Criminal Procedure Code, recorded by the S. I. he is alleged to have said that he had some doubt about Debi Murao accused mentioned in the First Information Report but he denied in this court to have made such a statement to the S. I. It appears to me that the S. I. in order to cover his *faux pas* has himself written this statement of Salik Ram under section 162, Criminal Procedure Code. No such doubt was expressed by Salik Ram so far as Chinta was concerned but still he was not challaned. If the S. I. honestly believed that there was some doubt about the participation of these two dacoits in the dacoity he should have put them for

identification like other accused persons and should have submitted the charge-sheet if there was sufficient evidence against them. The fact that he did not challan these two persons is highly reprehensible and has to be condemned in the strongest possible manner. He could not have played the dual role of the investigating officer as well as the judge. The S. I. also did not prepare the site-plan correctly and showed extreme carelessness in its preparation."

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The observations made by the trial court are made in a very restrained manner, for the facts of the case make it very probable that the investigating officer arrived at a deal with the two persons named in the first information report and, therefore, did not prosecute them. Obviously if the investigating agency is capable of not prosecuting the real culprits, it is also capable of prosecuting persons falsely. The way in which the names were mentioned in the first information report, in my opinion, shows that there was no false implication by Salik Ram, Salik Ram described one of the persons recognized as a Kahar, who lives in Amrita. A false implication cannot possibly be couched in such terms. I am satisfied that Salik Ram mentioned the names of those whom he recognized but for its own reasons the investigating agency did not prosecute these persons. The investigating agency cannot be permitted to let go the real culprits and put others in the dock merely because such a course suits it. On this ground alone, the investigation becomes highly tainted and it is not possible to place any reliance upon the evidence of identification.

There are several other circumstances also which throw considerable doubt on the evidence of identification. I have mentioned above that the identification parade was held on the 13th of March, 1954. The dacoity was committed on the 22nd of July, 1953. The parade was, therefore, held more than 7½ months after the date of the dacoity. Keeping in mind the alleged light that existed, it is difficult to accept that no less than five persons possessed such a remarkable power of

1957 observation and memory that they carried the features
GOKUL of the appellant in their minds for such a long time,
v. and succeeded in picking him out in the parade which
STATE was held. While there may be some individuals who
Mulla, J. possess exceptional power of observation and memory,
but when no less than five persons are supposed to possess
this extraordinary capacity, the result of identification
becomes doubtful as it is far more consistent with the
plea taken up by the appellant than with the natural
capacity of average human beings. In assessing evi-
dence in a criminal trial, the golden rule is to prefer
the probable to the possible and the probability is that
the performance of the identifying witnesses is not the
result of their observations and memory but that this
memory was rejuvenated by some external aid.

Analysing the parade, I find that five suspects were
mixed with twenty-five under-trials. Out of the five
suspects, three had their ears bored. The Magistrate
who conducted the identification proceedings states
that ten under-trials with their ears bored were mixed
in this parade. In other words the three suspects with
bored ears were in a group of thirteen. In my opinion,
this made the test of identification extremely easy as the
ratio of under-trials mixed with the suspects came to less
than 4 to 1. It is true that the whole parade consisted
of 30 persons but so far as the appellant was concerned,
he was in a group of 13 including three suspects and the
witnesses had to identify him from amongst this group.
In my opinion if the witnesses were told that they had to
pick out persons with their ears bored, their task was
considerably lightened as they had to take a chance only
in a group of 13. I am, therefore, of the opinion that
in the circumstances of this case the ratio of under-trials
mixed with the suspects was further reduced by the
precautions taken by the Magistrate who conducted
these proceedings. Precautions are taken to make the
test a real test and not to make it easier for the witnesses
to pick out a suspect. If more than ten persons with
their ears bored were not available to the Magistrate,
it was very easy to cover the holes of the ears with
paper chits and treating at least 15 other under-trials

in the same manner. I think under the circumstances, the possibility of a chance identification was not eliminated.

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One of the persons prosecuted in this case was Sriram. He took up the plea that he was known to the prosecution witnesses including Salik Ram and Radhika Devi from before. He succeeded in satisfying the court by producing irreproachable evidence that his plea was true and the trial court acquitted him on that account. It is, therefore, clear that the witnesses of this case are not dependable witnesses because they felt no hesitation in pretending to identify a person although they knew him very well from before. Either the witnesses themselves are dishonest or they are so much under the influence of the investigating agency that they were willing to make such a false statement.

The trial court had observed that the site-plan was not properly prepared by Sri Krishna Pal Singh. I looked into the original site-plan and I find that a fabrication has been made in that site-plan. The entry at no. 8 of the site-plan has been inserted subsequent to the preparation of the site-plan. The ink is clearly different and it is obvious that this entry did not exist at the time when the other entries were made in the site-plan. This entry and the signatures of Sri Krishna Pal Singh are distinctly in a different ink to the other entries in the site-plan. The least inference that can be drawn is that the site-plan was completed not at the time and date mentioned in the site-plan but at some later date. This again makes the investigation highly tainted and in these circumstances the evidence of identification cannot inspire confidence.

There is another circumstance which to a certain extent supports the defence taken by the appellant. It appears from the evidence of P. W. 17. Zahid Husain that when the appellant was being taken from the place of his arrest to Shahjahanpur, the train stopped at Bisalpur in the way. This is also admitted that the train stops at this station for 4 to 5 minutes. This is also admitted that Sri Krishna Pal Singh, Station Officer

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of Bisalpur along with some others was present at the Railway Station when the train stopped there. The appellant had taken the plea that he was shown to the witnesses at Bisalpur station when he was examined in the court of the Committing Magistrate. The evidence of P. W. 1, Gulzari shows that Salik Ram along with his wife and others mostly resided in Bisalpur. In view of this evidence, this fact is established that there was an opportunity for the investigating officer to show the appellant to Salik Ram and Srimati Radhika Devi. It is true that the appellant in his defence did not specifically cross-examine the investigating officer that Salik Ram and Srimati Radhika Devi were brought to the Railway Station. This in my opinion does not appreciably demolish the stand taken up by the appellant. The onus of proving his allegation is not cast upon an accused person, and if his contention cannot be reasonably eliminated by the evidence led by the prosecution, it must prevail. In my opinion, the prosecution evidence in this case does not eliminate the reasonable possibility of the appellant being shown to Salik Ram and Smt. Radhika Devi at Bisalpur Railway Station. The identification by Salik Ram is also greatly discounted by the fact that he made no less than three mistakes in a subsequent parade which was held only 21 days after the relevant parade.

The third identifying witness is Baldeo Chaukidar. I am extremely doubtful if he was present at the time of the dacoity at all. The first information report which is a scribed report mentions that Shyam Behari Chaukidar who belongs to village Ladpur was present. It is surprising that Baldeo who claims to be the Chaukidar of Ladpur for the last 15 years was not named in the first information report. It is not easy to accept that a Chaukidar of some other village is being named in the first information report and the Chaukidar of Ladpur itself is not being named by Salik Ram. The omission of Baldeo's name from the first information report cannot be explained away as an accidental omission. Baldeo stated in his evidence that he and Shyam Behari possessed torches. Shyam Behari is named but Baldeo is not

named in the first information report. This is all the more surprising because Baldeo accompanied Salik Ram when he went to lodge the report. I am, therefore, of the opinion that Baldeo has been introduced as a witness in this case by the investigating agency and he was probably not present at the time when the dacoity was committed. This again makes the evidence of identification extremely suspicious.

For all these reasons given above, I am of the opinion that the case against the appellant is not proved. He is, therefore, entitled to the benefit of doubt. I set aside the order of conviction passed against the appellant and acquit him. He should be set at liberty at once unless wanted in connection with some other case.

By the Court—In view of a difference of opinion between us in the case, we direct that it be laid before the Hon'ble the CHIEF JUSTICE so that under the provisions of section 429 of the Code of Criminal Procedure it may be laid before another learned Judge of this Court for opinion.

GURTU, J., :—This appeal has come to me upon a difference of opinion between my brother ROY, J., and my brother MULLA, J., under section 429 of the Code of Criminal Procedure.

Appellant Gokul was convicted on the 14th January, 1955, by the Additional Sessions Judge of Pilibhit under section 395 of the Indian Penal Code and was sentenced to five years' rigorous imprisonment. He submitted an appeal from jail under section 420 of the Code of Criminal Procedure. The appeal was numbered as 435 of 1955 and was submitted to my brother NASIRULLAH BEG under Part III, Chapter XVIII, Rule 13 (2) of Rules of Court. That rule runs as follows :

- "(2) On receipt of such petition of appeal or application for revision the office shall examine it and endorse thereon a report containing as nearly as may be the particulars required under rule 7 and the Registrar shall thereafter submit it to a Judge for orders. If the case is one which cannot

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be dealt with by the Judge sitting alone, the orders passed by the Judge shall be laid before another Judge for concurrence before they are issued. If the Judge does not dismiss the appeal or revision summarily and orders notice to be issued, the procedure prescribed for appeals and revisions presented in court shall, as nearly as may be, followed."

On the 16th March, 1955, an appeal from the same conviction was presented to this Court by the appellant through counsel under section 419 of the Code of Criminal Procedure.

On this appeal the office made the following endorsement :

"Jail appeal on behalf of Gokul has been received in this very case and has been submitted to the Hon'ble Judge for admission which has not been received back yet. This is an appeal for the second time on behalf of Gokul through counsel. In time up to 19th March, 1955.

(Sd.) R. N. SINGH.

17. 3. 55."

Then the Registrar made an endorsement to the following effect :

"Presented to-day. Lay before Court for orders on 22. 3. 55.

(Sd.) (ILLEGIBLE).

13. 3. 55."

There is a further office report, dated 22nd March, 1955 which is as follows :

"N. B—Jail appeal on behalf of Gokul has been dismissed by Hon'ble BEG, J., placed below.

(Sd.) R. N. SINGH.

22. 3. 1955."

Then on 29th March, 1955, the appeal was laid for orders before my brother JAMES who passed the following order :

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"Appellant's learned counsel states that the appellant's appeal from jail was previously dismissed summarily. A regular appeal has now been filed. It is hereby admitted and will be heard on merits in due course. There is also a prayer for bail, but, in view of the evidence of identification against the appellant, bail cannot be allowed for the pendency of the appeal.

(Sd.) B. R. JAMES."

The judgment of my brother BEG on the jail appeal was sealed on 30th March, 1955. The date of my brother's judgment is not given at the foot of the judgment but it appears that the judgment was given on some date prior to 22nd March, 1955 and after 17th March, 1955. The represented appeal came up for final hearing before my brother MULLA, J., who referred it on 23rd October, 1956, to a Division Bench because in his view the following important questions of law arose for determination :

"(1) Is the proviso to section 421, Criminal Procedure Code, which makes a distinction between appeals filed under section 419, Criminal Procedure Code, and section 420, Criminal Procedure Code, justifiable or whether it violates Article 14 of the Constitution of India as it lays a basis for discrimination which is neither reasonable nor compatible with the principles of Justice ?

(2) Has the High Court any powers to admit and hear a second appeal filed through a counsel after the first appeal by the prisoner from jail has been dismissed summarily referred under the proviso to section 421, Criminal Procedure Code ?

(3) Can it be said that the High Court is not de

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High Court is affixed to such a judgment?
and

- (4) Can the High Court review its own judgment under section 561-A, Criminal Procedure Code?"

When the appeal went before the Division Bench there was a difference between the learned Judges. My brother MULLA's, answer to the first question was that the inclusion of the words "presented under section 419, Criminal Procedure Code" has made the proviso unjustifiable and *ultra vires* of the Constitution of India, but these words could be severed from the proviso, which after this deletion becomes a salutary rule of law. My brother ROY did not consider that any part of the proviso to section 419 was *ultra vires* of the Constitution of India. In regard to questions 2 and 3 my learned brethren were agreed that the High Court had no power to hear a second appeal filed through a counsel after the first appeal filed by the prisoner from jail had been summarily rejected. There was also an agreement in holding that the fixing of the seal of the High Court was not necessary to give validity to the judgment of the High Court. On the fourth question my brother MULLA was of the view that under certain circumstances the High Court could review its own judgment under section 561-A, Criminal Procedure Code. My brother ROY was of the contrary view.

After having expressed their views on the legal questions, my brethren considered the represented appeal on merits and Mr. Justice MULLA expressed the view that the appellant's appeal should be allowed, that he was entitled to the benefit of doubt and that he should be acquitted. My brother ROY expressed the view that the appeal was without force and should be dismissed.

In view of the difference of opinion between the two learned Judges as indicated above they passed the following order:

In view of the difference of opinion between us in direct that it be laid before the CHIEF JUSTICE so that under of section 429 of the Code of

Criminal Procedure it may be laid before any learned Judge of this Court for opinion."

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When the appeal was opened before me there was some discussion at the Bar and the order passed by my brother BEG, J., was examined. That order is on a printed form and for purposes of convenience a copy thereof also on a printed form is included by me in this judgment as an annexure. Upon a perusal of this judgment of Mr. Justice BEG it was agreed by Sri Yashoda Nandan, learned counsel for the appellant, and the learned Advocate General for the State that the learned Judge's order consisted not merely of the word "dismissed" but that the learned Judge's order was as follows :

"Dismissed. Delay seal pending expiry of period of limitation."

The question then arose as to what exactly was meant by the learned Judge using the words "delay seal pending expiry of period of limitation". The learned Advocate General conceded that the judgment in the jail appeal by my brother BEG, J., not merely dismissed the appeal but made the dismissal provisional by expressly saying that the seal of the court should not be put on the judgment till the expiry of the period of limitation. He conceded that it was quite clear from this judgment that if a regular appeal was filed within the period of limitation that regular appeal would be heard in the regular way on the merits and the order of dismissal would then have no effect. He also conceded that inasmuch as a regular appeal had been presented to the court on 19th March, 1955, within limitation as reported by the office, on the correct interpretation of the order of Mr. Justice BEG his order of dismissal ceased to have any effect after the 19th March, 1955, and was not a bar to the hearing of the represented appeal on merits. The learned Advocate General further conceded that the learned Judge's order of my brother BEG and the judgment by my brother BEG in the way of the regular appeal

allowed.

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on the 30th March, 1955, of the judgment must be considered according to the learned Advocate General to be in violation of the judgment when correctly interpreted and, therefore, the mere sealing of the judgment cannot operate as a bar to the hearing of the represented appeal.

I have reproduced the admission of the learned Advocate General in his own words. The learned counsel for the appellant was of the same view as the Advocate General.

In view of these concessions by the counsel for the State and for the appellant, it is not necessary for me to examine this matter at any great length but I might briefly give my reasons why I think that the hearing of the represented appeal by me on the merits is not barred.

I have already reproduced the judgment of my brother BEG, J. No doubt the word dismissed is there but the words "delay seal pending expiry of period of limitation" are also a part of its judgment. Now these words cannot be treated as surplusage. They must be given some meaning. If these words were interpreted merely as a matter of language, then, of course, the words only mean what they say, namely, that pending expiry of the period of limitation the seal of the Court should not be affixed. The question now arises why it was necessary to add these words after the word "dismissed". The reason is I think to be found in *Bhawani Dehal v. King-Emperor* (1). That was a case in which a convict had filed an appeal from jail to the Court of Session and had also presented a petition of appeal within limitation through a legal practitioner. It was held by this Court that the Sessions Judge was not competent to dismiss the appeal from jail summarily but should have heard the convict's appeal. It was probably because this Court wanted to keep its hands free to dispose of a represented appeal presented within limitation to it even if a previous appeal presented from jail had been summarily dismissed, that the learned Judge made at the time of the summary dismissal an order that the appeal should not be sealed pending expiry of limitation. In *Lachman* it was held that a summary dismissal of an appeal presented from jail should not be sealed pending expiry of limitation. In *Lachman* (2) A.I.R. 1934 Ail. 988.

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In my view the thorny question on which there was a difference of opinion between my brothers, Roy and MULLA, as to whether under certain circumstances this Court can review a criminal judgment or order passed by it does not arise. I am not called upon in this case to review any judgment or order. All that I am called upon is to give effect to it, inasmuch as the apparent meaning of the words "delay seal pending expiry of period of limitation" in the setting and in the background cannot be the real meaning of these words : I had to interpret those words in order to give effect to the judgment. In my view section 561-A, Criminal Procedure Code, certainly entitles a court to interpret its own judgment. Section 561-A, Criminal Procedure Code, runs as follows :

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."

An interpretation of my brother BEG's order is necessary for the purpose of giving effect to it and for securing the ends of justice. I can interpret the words which my brother BEG, J., used as well as he himself can do. The words are not specifically his own words. They are words which appear in the printed form and they are the words which stand incorporated in the order of every Judge who dismisses an appeal from jail summarily, using the printed form.

In the view that I take of my brother BEG's order the dismissal of the summary appeal now ceases to have any effect. Therefore, there is nothing to prevent my disposing of the represented appeal.

Learned J. has said that there is any bar to a convicted person's order dismissed appeal first and then presenting a fresh appeal within limitation. As soon as directed, it can be connected with the original appeal. CH. can be listed together.

The appellant would then be entitled to withdraw his jail appeal and to proceed with the represented appeal. This position is different to the position which exists where a jail appeal is summarily, finally and unconditionally dismissed and then an appellant is inviting a second decision on a represented appeal preferred within limitation.

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In my view the order of my brother BEG itself permitted the hearing of a represented appeal if it was filed within the period of limitation and itself indicated that in the eventuality of the represented appeal being so filed the order of summary dismissal would stand vacated and the represented appeal would be disposed of on merits. In the view that I take of this case, none of the legal points raised by my brother MULLA and on which opinion was expressed by my brothers MULLA and ROY arise for decision, nor is my decision invited by either of the counsel for the State or the appellant on those points.

I now proceed to deal with the represented appeal of the appellant on the merits. I have heard his counsel and I have also heard the learned Advocate General and the State counsel. The facts of the appeal may now be given.

The factum of dacoity is not disputed in this appeal. The prosecution story was that an armed dacoity was committed at the house of Salik Ram, a resident of village Ladpur, police station Bisalpur, district Pilibhit. About 18 or 20 dacoits some of whom had fire-arms whereas others who had spears and lathis came and entered the house of Salik Ram. Salik Ram lived in the house along with his brother, wife and other relations. At that time Salik Ram was sleeping in a *sidari* where it is said that a lantern was burning. The sound of foot-steps awakened Salik Ram who woke up his wife also and shouted to his brother Balak Ram who was sleeping in a part of the house. Salik Ram's wife and children were in the outer door where by torchlight they saw the dacoits. One of the dacoits was killed. Salik Ram raised an alarm and the dacoits fled to save Salik Ram. The dacoits were sentenced to death.

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Radhika Devi also. She was made to deliver up the keys. The dacoits collected booty from the house. Neighbours gathered round the house. When the dacoits went out they fired their guns and ran in a group. According to the prosecution three dacoits were recognized on the spot, namely, Debi Murao and Chinta Kurmi, who were known by name, and the third dacoit recognized was a Kahar who was identified by the locality in which he lived but his name was not known.

The first information report was lodged the next day at 10 a.m. The known dacoits were named indicated therein. The suspects were arrested on various dates and were put up for identification. The present appellant was put up for identification on the 13th of March, 1954.

Out of the eight persons put up for trial before the Magistrate three were discharged and five were committed to the Court of Session. That court acquitted three and convicted only the appellant and Ram Prasad. Ram Prasad did not appeal and the present appellant appealed first from jail and then filed this regular appeal.

The defence of the appellant was first indicated at the identification parade held on the 13th of March, 1954. The Magistrate who carried out the identification made the following note on the identification chart: "Gokul states that he was shown to the witnesses at thana. The witnesses saw him at Bisalpur police station in the train when he was being brought from Shahjahanpur." Before the Magistrate the defence of the appellant was that he was on inimical terms with Salik Ram and had been implicated for that reason and that the witnesses were under the influence of the police. He then stated as follows:

"The police detained me in the Katra thana for 2-3 days after arresting me, where I was interrogated by the witnesses. They sent me to Shahjahanpur by one train. I was shown to the witnesses at Bisalpur Station as well." The appellant did not add

At the identification parade held in jail on the 13th of March, 1954, the appellant was identified by five witnesses, namely, P. W. 2 Baldeo, P. W. 3 Hori, P. W. 4, Umrao, P. W. 19 Salik Ram and P. W. 21 Radhika Devi. The trial court rejected the evidence of Umrao and Hori but accepted the identification of the three other witnesses and convicted the appellant upon their testimony. The witnesses rejected by the trial court were rightly rejected.

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So far as P. W. 2, Baldeo is concerned, his evidence has not been acted upon by either my brother Roy or my brother MULLA, JJ. Baldeo is the Chaukidar. In his deposition he stated that he was sleeping in his house and went to the house of Salik Ram when he heard the firing. He says he was at a place about 30—35 paces from his house when he heard a fire and returned back and stood by the side of a *chapper* in his *sahan*. He says that he saw the dacoits coming out of the house and running through—and it was then that he identified the dacoits. He picked up Ram Prasad and Gokul. It is to be noted that in the first information report made by Salik Ram, his name is not mentioned as an eye-witness. The chaukidar of another village has been named as a witness. It is evident, therefore, that the maker of the first information report was also mentioning officials like chaukidars and the failure to mention Baldeo's name is significant. Upon his own saying Baldeo seems to have kept well away from the scene and I am disinclined to believe that he was as near the scene of occurrence as he pretends to be. Being the village Chaukidar I suppose he had to show that he did take some effective part in the incident. Having considered his evidence, I am not prepared to place any reliance upon him either. I also adopt the reasoning of my brother Roy and MULLA, JJ., in discarding his evidence. Defendants are the evidence of only two witnesses were in sentences. Ram and Radhika Devi. Member A. Howed. their identification is this. Defendant identified suspects namely, on the 13th of March, 1954. These two

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held within a month of each other. There was an earlier identification parade of 24th November, 1953, but the distance in point of time between this identification and the two previous ones is sufficiently long for that parade to be left out of consideration. At the first parade Salik Ram rightly identified two persons correctly and wrongly identified one person. In the second identification parade he rightly identified one person correctly and three persons incorrectly. The total position in regard to these two parades, therefore, is that three persons have been correctly identified and four have been wrongly identified. So far as Radhika Devi is concerned, the position is that at the first identification parade she correctly identified three persons and wrongly identified one person. At the second parade the correct identification was one and the incorrect identifications were three. The total position, therefore, is that there were four correct identifications and four incorrect identifications. From all this it will be apparent that Salik Ram and Radhika Devi are not very careful observers and were not observing carefully.

The learned Sessions Judge has only considered the effect of the one parade which concerned the present appellant. In my view inasmuch as this identification had taken place almost eight months after the occurrence it is specially necessary in this case to carefully check the capacity of witnesses on whom reliance is placed to retain impressions of suspects. We find in this case that the difference of a month's time has resulted in a considerable blurring of the impression. The results of the second parade are less favourable than the first parade. I am generally anxious not to lay down any rigid general rules in regard to the weighing of testimony, but in this case the incident took place in the night and, therefore, it is necessary carefully to test the capacity of witnesses to retain impressions of suspects as they may have carried at the

In view of the order dismissed.

operation of the evidence of
direct brothers, MULLA and ROY,
CH case in regard to the pre-
of although the lantern has

not been produced in evidence and the story that a lantern was burning in a village home even when the inmates were asleep does not appeal to me, nonetheless it is now usual for dacoits to carry torches and for inmates to have these and to use them and, therefore, it may be presumed that there was light available. This is, however, not the case when there was moon light and though I am prepared to concede that there was intermittent lighting up of the scene by torches I do not think that at any point of time there was that continuity of flow of light which one would get from an electric light which was burning, or from a well-lit kerosene oil lamp. In such a condition of light according to the evidence two sleeping persons woke up and one of them, namely, Salik Ram, flashed his light and was assaulted and then his wife followed up and was also assaulted. According to the prosecution itself many dacoits took a hand in the assault. Radhika Devi intervened when her husband was being beaten. The injury report shows that the following injuries were caused to Salik Ram :

- (1) Contused wound $1\frac{3}{4}'' \times \frac{1}{4}'' \times$ scalp deep 4'' above the right ear.
- (2) Contused wound $1'' \times \frac{1}{4}'' \times$ scalp deep $2\frac{1}{2}''$ above the left ear.
- (3) Contusion $2'' \times 1''$ on the right temple.
- (4) Contusion $4'' \times 3''$ over the right shoulder joint.
- (5) Contusion $2'' \times 2''$ over the right sterno-clavicular joint.
- (6) Contusion $2'' \times 2''$ over the middle of left scapula.
- (7) Contusion $3'' \times \frac{3}{4}''$ below the right axilla.
- (8) Bruised swelling $1'' \times 1''$ over the back of the left wrist.
- (9) Abrasion size small pen, on the middle of right second toe.

The following injuries were caused to Radhika Devi :

- (1) Punctured wound $1'' \times \frac{1}{4}''$ above the middle of right thumb.
- (2) Contusion $4'' \times 2''$ over the right shoulder joint.

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- (3) Contusion $2\frac{1}{2}'' \times \frac{1}{2}''$ over the outer side and middle of right arm.
- (4) Contusion $3'' \times \frac{3}{4}''$ over the lower part and outer side of right forearm.
- (5) Penetrated wound $\frac{3}{4}'' \times \frac{1}{2}''$ bone deep an inch above the right wrist (ulner side).
- (6) Bruised swelling $2'' \times 1''$ over the middle and back left palm.
- (7) Contusion $6'' \times 1''$ across the left scapula.

It is to be noted that Radhika Devi has received a punctured wound about the middle of the right eye-brow. This must have considerably shaken her up. She states in her evidence that immediately she intervened the dacoits speared her which means that the injury above the eye was caused at the very beginning. There is no doubt that Salik Ram was also shaken up because he asserts that he became unconscious. Now when the assailants and the person assaulted came close together it is no doubt possible that the assailants may be recognized, but in an assault of this nature at the dead of night in intermittent light with such a large number of persons being amongst those who were assaulting and with the natural fear and confusion that the presence of dacoits creates in the hearts of men and women, I doubt whether persons so situate as Sukhram and Radhika Devi were would be in a position to so carefully notice the features of those who were assaulting them as to enable reliance to be placed upon their identification after a period of eight months, particularly when upon a total view of their picking out at two identifications it is seen that they picked out an equal number of suspects and non-suspects.

I agree with the view expressed by my brother Roy that in this case the appellant has failed to prove that he was known to the witnesses or that these witnesses were

ordered to attend a parade, however, there is no evidence of any previous identifications. Then taking a risk at the identification of Salik Ram and Radhika Devi compared to pick out persons

who had no connexion with the crime at all. It may be pointed out here that out of the five persons picked out by Radhika Devi two were discharged, two have been convicted and one has been acquitted. So far as the persons picked out by Salik Ram are concerned, two have been convicted and two acquitted.

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There is a further consideration. At the identification parade although twenty-five men were mixed, amongst those who were mixed there were only ten persons who had their ears bored. The appellant Gokul and two other persons who were put up for identification on that day had their ears bored. No steps were taken to cover up the bored ears so that the witnesses had really to pick out three men, out of thirteen. In view of this small number of under-trials with bored ears who were mixed at the parade the assurance which flows from the mixing of a larger number is not available in this case.

Upon a total view of the position I have come to the conclusion that the element of mistaken identity in the identification of Gokul cannot be eliminated in this case having regard to the nature of the light, the circumstances existing at the time of the crime, the period which had elapsed between the identification of Gokul and the date of the crime. For these reasons I think that Gokul is entitled to the benefit of doubt. I accordingly accept the appeal, set aside his conviction and sentence and direct his acquittal.

I understand that the case is now to go back to the Division Bench. Let this be done.

By the Court—A difference of opinion having had arisen between us, the case was referred to a learned third Judge for his opinion. His opinion has been received. In view of that opinion we allow this appeal, set aside the conviction and sentence of the appellant and acquit him of the charge. The respondents are not surrender. The sentences are allowed.

APPELLATE CRIMINAL

Before Mr. Justice Asthana and Mr. Justice S. N. Sahai

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Criminal Procedure Code, 1898, s. 417 (1) —Not ultra vires—Constitution of India, 1950, Art. 14—"Person" does not include "State"—Appeal against acquittal—Right given to State—No discrimination—Ex parte order, effect of—Right of private defence, s. 417 (1), Criminal Procedure Code, 1898, is not ultra vires of the Constitution.

The word "person" in Art. 14 of the Constitution does not include "State" as representing the society and the mere fact that the "State" has been given the right of appeal against an appellate order of acquittal under s. 417 (1), Criminal Procedure Code, which right has not been given to a private individual does not create any discrimination under Art. 14 of the Constitution.

An *ex parte* order of a magistrate putting a person in possession of certain property has the same legal effect as an order after contest and no party can ignore it and plead right of private defence in resisting the order.

Case-law discussed.

Government Appeal no. 1512 of 1954, from an order of acquittal passed by H. P. Gupta, Additional Sessions Judge of Meerut, dated the 14th April, 1954, in Criminal Appeal No. 195 of 1953.

The facts appear in the judgment.

The Government Advocate for the appellant.

Maheshwari Dayal, Rajeshji Verma and B. N. Katju for the respondents.

The judgment of the Court was delivered by—

ASTHANA, J.:—This is an appeal by the State Government against the acquittal of the respondents on the ground that sections 148 and 325, Indian Penal Code. The respondents were acquitted by the trial court on both these grounds. In view of the fact that the respondents were sentenced to a fine of Rs.50 under section 148, Indian Penal Code, and three months' imprisonment under section 325, Indian Penal Code. They appealed against

their conviction and sentence, which was allowed by the learned Sessions Judge, Meerut, who set aside their conviction and sentence.

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It appears that Smt. Manbhari was the owner of certain plots. She executed a lease on 21st June, 1946, in favour of the respondents Shanker and Asa who got possession over the plots. The rival party Balwant and Hari did not like the lease rights granted by Smt. Manbhari with the result that there was civil and criminal litigation between them on one side and Shanker and Asa on the other. It may be mentioned here that in this litigation Smt. Manbhari supported the respondents. It appears that in the civil suit the issue on the question of tenancy was remitted to the revenue court and the same was decided in favour of the respondents. Later on Balwant started proceedings under section 145, Criminal Procedure Code, on 19th March, 1949, against the respondents Shanker and Asa. Smt. Manbhari was no party to this proceeding. An application was made on the allegation that the *rabi* crop standing in the plots in dispute in 1356F. had been raised by Balwant as a sub-tenant of Smt. Manbhari and that Shanker and Asa were trying to take forcible possession of the land and the crop. It was prayed that Shanker and Asa might be forbidden from interfering with his possession. The learned Magistrate called for a report from the Station Officer and directed him to attach the crop if he found any apprehension of the breach of the peace. The Station Officer reported that there was some dispute between the parties and he made an attachment of the crop of 1356F. On receipt of the report from the Station Officer the learned Magistrate ordered the parties to file their written statements. In the meantime the *kharif* crop of 1356 F. also came into existence and so Balwant made another application stating that the opposite parties were endeavouring to remove the said crop and a seizure order was issued. On the basis of the report of the Station Officer, the learned Magistrate again passed an order of attachment of the crop. The learned Magistrate then allowed the application of the respondent Shanker and Asa for the attachment of the crop. The learned Magistrate then ordered the Station Officer to inquire into the matter and report back to him. If he found that there was any apprehension of the breach of the peace, he was to attach the crop.

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of the peace. Both the parties filed their written statements and produced their evidence. The learned Magistrate was unable to come to any definite decision as to which party was in possession of the disputed plots and the crops in them on the relevant dates and he, therefore, ordered that the property would remain attached under section 146(1), Criminal Procedure Code, to be released in favour of the party declared in rightful possession by a competent court. This order was passed on the 25th February, 1950. On 8th September, 1951, Smt. Manbhari made an application to the Magistrate that she was a tenant of the land in suit and was entitled to have the sale proceeds of the crop in deposit in the treasury and also possession over the land. The learned Magistrate passed an *ex parte* order on the 28th November, 1951, ordering that the property be released in her favour. In pursuance of this order she obtained possession over the disputed plots. It is alleged by the prosecution that on the morning of the 2nd July, 1952, she went to the disputed plots to get them ploughed and cultivated when the accused armed with *lathis* and spears arrived there and asked her not to cultivate the plots as they belonged to them. It is further alleged that when Smt. Manbhari said that she had obtained possession over the plots and was entitled to cultivate them the accused started beating her and her daughter Smt. Chhoti who had also come there with meals. It is further alleged that in the meantime the complainant and his brother Balwant also reached there on hearing the noise and tried to rescue Smt. Manbhari and her daughter and they too were beaten.

The defence of the accused was that the plots belonged to them and that they were entitled to beat Smt. Manbhari and her daughter and the injured persons in the right of defence of property. They denied

two learned judges
from within order at
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after a consideration of the
evidence that the accused had any
directed others when she had
acts in pursuance of the
or if the accused had any

grievance against the said order the proper course for them was to get it set aside. He, therefore, convicted and sentenced them. The learned Sessions Judge was of the opinion that the *ex parte* order passed by the Magistrate in favour of Smt. Manbhari was illegal and not binding on the respondents, that they were in actual possession of the plots in dispute and had a right to defend their possession against Smt. Manbhari and others who wanted to dispossess them. In view of this finding he set aside the conviction and sentence and ordered their acquittal.

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At the time of the hearing of the appeal a preliminary objection was taken on behalf of the respondents that the appeal was not competent as section 400 (17) (1), Cr. P. C., which empowered the State Government to file an appeal to this Court from the appellate court's order of acquittal passed by any court other than the High Court was *ultra vires* of the Constitution, as it contravened Article 14 of the Constitution. This Article provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. It was argued that as a private person had not been given the right of appeal against the order of the appellate court maintaining his conviction, the State should not have been given the right to file an appeal against the order of acquittal passed by the appellate court and in giving this power to the State discrimination had been made between the individual and the State. Article 14 contemplates equality before the law of person in the State. In order to decide whether section 417, Criminal Procedure Code, contravenes Article 14 of the Constitution it is necessary to consider whether the word "person" used in the said Article includes the State. We are of opinion that "State" is much wider than "person" or "persons" and is not included in "person". It exists for the benefit of the society as a whole and respondents are benefit of any individual person sentenced to imprisonment. "person" used in Article 14 means a natural person. A body of persons who have no legal personality is not a "person" in our opinion the State has no legal personality.

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an appeal against an order of acquittal on the ground that it will not misuse that right or abuse it and will act only if it considers that in the interest of the society it is necessary that an appeal should be filed against the order of acquittal. In the case of an individual there is a danger of his abusing the right of filing an appeal against the appellate order of conviction if such a right were given to him. Even in the case of an acquittal by the appellate court the complainant or any individual person has not been given the right of appeal because it could not be said that that right would be exercised by him for the benefit of the entire society and not only towards his own end. It is on the same principle that the State has been given a longer period of limitation for filing an appeal against an order of acquittal, whereas the convicted person has been given a much shorter period for filing an appeal against the order of conviction. It has not been contended for the respondent that there was a discrimination between the State and an individual person on the ground that the former had been given a longer period of limitation than the latter. The State has to consult so many bodies before filing an appeal and it is one of the reasons why it has been given a longer period of limitation. It is not so in the case of an individual who has to consult his lawyer only.

In *Sheo Prasad v. Punjab State* (1) it was held that the natural and obvious meaning of the expression "person" in Article 14 of the Constitution was a living human being, a man, woman or child, an individual of the human race, that this word included natural persons and artificial persons like Corporations and Joint Stock Companies, but it did not include a State or Government. It was further held that though a State was a moral person having an understanding and a will capable of acquiring rights and of contracting. State in its political organization is distinct from the inhabitants who reside there, that though

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Government in common parlance was synonymous with the State, in actual fact the State was a country or assemblage of people while the Government was a political agency through which it acted, that though the State was capable of suing and being sued, it was not so because the State was person but because Article 300 of the Constitution had made an express provision in that behalf, that neither a State nor a Government could fall between the ambit of the expression "person" appearing in Article 14 of the Constitution. It was also held in this case that where the State acting as such reserved itself certain rights which were denied to other persons in similar circumstances, the provisions of Article 14 were not violated and that the liberty guaranteed by the due process of the American Constitution was the liberty of the natural and not artificial person.

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In *Bank of India v. John Bowman* (1) their Lordships CHAGLA, C. J., and DIXIT, J., made the following observation :

"It is not true to say that the State is denying equality before the law to any person by claiming this special privilege. Article 14 of the Constitution would only be offended against if the State made a discrimination between one creditor and other or between one class of creditors and another. The principle of common law is that the State has priority over all competing creditors if the debts are of the same quality. The State here is not claiming as a creditor. It may be a creditor but the right which it claims is in its capacity as State and its contention is that as it is the custodian of public welfare, as moneys which are deposited belong to the Government and are to be used in public interest. It is not allowed."

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who have not to discharge the duties or responsibilities of the State. Therefore the common law with regard to priority of debts due to the State is not in any way inconsistent with the fundamental rights embodied in Part III of the Constitution."

In *Abdul Ali Abdul Rahman v. Mst. Jannat* (1) it was observed by OAK, J., that considering the special position held by the State in criminal jurisprudence, the Legislature was justified in placing the State on a special footing as regards appeals against acquittals. So the various provisions of section 17, Criminal Procedure Code, for appeals by the State Government and appeals by private complainant could be justified on the principle of reasonable classification and did not offend against Article 14 of the Constitution. The reason given by the learned Judge in support of the above observation was stated as follows :

"Although sub-section (1) of section 417, Criminal Procedure Code, enables the State Government to file appeals against orders of acquittal, in practice the State Government files appeals in only a small percentage of cases of acquittal. It is expected that a State Government will file such an appeal only when it is expedient in public interest. On the other hand there is danger or frivolous appeals by private complainants against orders of acquittal. The State represents society as a whole. On the other hand a private complainant is mainly concerned with his personal interest.

"Very often a private complainant is actuated by a feeling of revenge. The State Government, on the other hand, is expected to file appeals in the public interest. The State represents society as a whole. There is no direct interest of a private complainant.

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equal protection as regards substantive laws but procedural laws also came within its ambit, that the implication of the Article was that all litigants similarly situated were entitled to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination. It appears that the class of persons alleged to have been dealt with by section 5 (1) of the Taxation on Income (Investigation Commission) Act was comprised of those unsocial elements in society who during recent years prior to the passing of the Act had made substantial profits and had evaded payment of tax on those profits and whose cases were referred to the Investigation Commission before 1st September, 1948. Assuming that evasion of tax to a substantial amount formed a basis of classification at all for imposing drastic procedure on that class, the inclusion of only such of them whose cases had been referred before 1st September, 1948, into a class for being dealt with by the drastic procedure, leaving other tax-evaders to be dealt with under the ordinary law, would be a clear discrimination for the reference of the case within a particular time, had no special or rational nexus with the necessity for drastic procedure.

We do not think that the principle underlying this decision is applicable to the facts of the present case. There is nothing in this decision that the State was included in the definition of "person" in Article 14 of the Constitution or that there was any discrimination simply because the State as representing the society had been given the right of appeal against appellate order of acquittal, whereas no such right had been given to a private individual.

On a consideration of the various authorities which have been cited above, we are of opinion that the State is not included in the word "person" in Article 14 of the Constitution and that mere-ly given the right of appeal against appellate order of acquittal, which right has been given to a private individual, there is really no discrimination against the State under Article 14 of the Constitution.

In the circumstances we are of opinion that section 417(1), Criminal Procedure Code, is not *ultra vires* of the Constitution and the contention on behalf of the respondents had, therefore has no force.

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Coming now to the merits of the case, we find that the order of the lower appellate court cannot be maintained. It appears from an examination of the record that the property in dispute which consisted of certain plots and the crops therein was under attachment in a proceeding under section 145, Criminal Procedure Code. It is also clear from the record that Smt. Manbhari was not party to the proceeding under section 145, Criminal Procedure Code, that this proceeding had been started by one Balwant against the respondents Shanker and Asa who were claiming possession over the disputed plots. It further appears from the record that on the 25th February, 1950, the learned Magistrate passed an order that the property in dispute would remain attached under section 146 (1), Criminal Procedure Code, as he was unable to come to any decision as to which of the parties was in possession of it on the relevant date. He further ordered that the attachment would continue and that the property would be released in favour of the party who obtained a declaration in respect of his possession from a competent court. On the 8th September, 1951, Smt. Manbhari made an application to the Magistrate that she was tenant of the land in suit and was entitled to possession over the disputed land and also to the sale-proceeds of the crop deposited in the treasury and the learned Magistrate passed an *ex parte* order on 28th November, 1951, ordering that the property should be released in her favour. In pursuance of this order she obtained possession over the disputed land and executed a *dakhalmama* for the same. After obtaining possession she went to cultivate the disputed land with Balwant, his his son. Respondents are her daughter Smt. Chhoti who were in sentences. beaten by the respondents. than 21 injuries consisting of wounds, incised wounds, left leg and permanent d

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central incisor. Smt. Manbhari received three injuries consisting of two incised wounds and one bruise. Smt. Chhoti received eight injuries consisting of one contused wound and seven bruises and Hari Ram received eleven injuries consisting of one incised wound and a number of bruises. It has been contended on behalf of the State that the respondents had no right to beat Smt. Manbhari and her companions when they went to cultivate the disputed land after obtaining the *dakhalnama* in pursuance of the order of the Magistrate and that in any case the respondents were not entitled to cultivate the disputed land when it was under attachment in proceedings under section 145, Criminal Procedure Code, between them on one side and Balwant and others on the other side, even if the release order in favour of Smt. Manbhari was held not to be legal. There can be no doubt that the respondents had no right to take possession of the disputed land when it was attached in the proceeding under section 145, Criminal Procedure Code. If they had any grievance against the *ex parte* order passed in favour of Smt. Manbhari their proper remedy was to apply to the Magistrate to have that order set aside and not to take the law in their own hands and start beating Smt. Manbhari and others when Smt. Manbhari went to cultivate it after having obtained the order from the Magistrate. It further appears from the nature and the number of injuries found on the person of Balwant and his son Hari Ram and the two ladies Smt. Manbhari and her daughter Smt. Chhoti that the main object of the respondents was not to stop them from ploughing the disputed land but to teach them a lesson for their past conduct which had led to the proceedings under section 145, Criminal Procedure Code. It may not be out of place to mention here that before the proceeding under section 145, Criminal Procedure Code, there had been civil litigation between the respondents and Balwant in respect of the disputed land. In view of the fact that Balwant had obtained a lease in respect of it in the civil court which was challenged by the respondents but they were unsuccessful.

sarily harassed by Balwant and others and Smt. Manbhari was supporting them and they, therefore, decided to teach them a lesson by giving them a severe beating. There is ample evidence on the record that the respondents beat Balwant and others when they went to cultivate the disputed land and on this point the findings of the courts below are concurrent. In our opinion the conduct of the respondents in beating Smt. Manbhari and others when they had gone to plough the land in dispute in pursuance of the order of the Magistrate, even though the order was *ex parte*, was unjustified. It could not be said that they had any right of defence of property and it was in the exercise of such right that they had inflicted the injuries on Smt. Manbhari and others. We do not agree with the learned Sessions Judge that merely because the order of the learned Magistrate in favour of Smt. Manbhari was *ex parte*, it would have no legal effect and that the respondents could ignore it and beat her when she went to cultivate the disputed land in pursuance of this order. As we have already pointed out above, the proper course for the respondents was to have that order set aside.

We are, therefore, of opinion that this appeal should be allowed and the order of the lower appellate court acquitting the respondents should be set aside. Accordingly we allow this appeal, set aside the order of the lower appellate court, restore that of the trial court and convict the respondents under section 148 and section 325, read with section 149, Indian Penal Code, and sentence each of them to a fine of Rs.50 under section 148, Indian Penal Code, in default each of them to undergo rigorous imprisonment for one month, and three months' rigorous imprisonment and a fine of Rs.75 under section 325/149, Indian Penal Code; in default of payment of fine each of them to undergo 1½ months' further rigorous imprisonment. As the respondents are on bail, they shall surrender and ~~serve~~ execute their sentences.

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Order A

Allowed.

APPELLATE CIVIL

*Before Mr. Justice Chaturvedi and Mr. Justice
Srivastava*

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STATE OF UTTAR PRADESH AND OTHERS
(RESPONDENTS)

Constitution of India, 1950—Arts. 132, 133 (1) (b), 226 civil proceedings—Judicial process when civil proceedings—Leave to appeal to Supreme Court—When allowable.

A judicial process to enforce a civil right or any remedy employed to vindicate that right, whether that right is under Art. 226 of the Constitution or under any other provision of law, is a civil proceeding. The word "proceeding" covers every step in an action and is equivalent to an action.

An order in regard to a proceeding, which relates to determination of individual rights or redress of individual wrongs, is in regard to a civil proceeding within the meaning of the words in Art. 133 (1) (b) of the Constitution, and leave to appeal to Supreme Court is to be granted if the judgment under appeal involves directly or indirectly a question respecting property, worth not less than Rs.20,000.

Case-law discussed.

Supreme Court Appeal No. 25 of 1957, in Civil Misc. Writ No. 7524 of 1951.

The facts appear in the judgment.

S. S. Dhavan for the appellant.

CHATURVEDI, J.:—This is an application under Articles 132 (1) and 133 (1) of the Constitution for grant of certificates that the case involves substantial questions of law as to the interpretation of the Constitution and that the judgment sought to be appealed against involves directly and indirectly claim or question respecting property, worth not less than Rs.20,000.

The facts of the case, in brief, are that the applicant, Brij Lal Suri, is the Karta of a joint Hindu family firm trading under the name of Northern India Lime Marketing Association, Dehra Dun, (hereinafter called

the firm). There are substantial lime stone and other mineral deposits in the district of Dehra Dun and some other districts in this State. On the 31st July, 1948, the firm was granted a prospecting licence to prospect for sulphates, carbonates, phosphates and sulphides, such as Gypsum, Alabaster, Lime stone and others. The licence was in the standard form of prospecting licence, as prescribed in the U. P. Mining Concessions and Mineral Development Rules, 1940, (hereinafter referred to as 1940 Rules). The licence was initially for the period of one year, but one of the terms of the licence was that the licensee would have the right, subject to compliance with the rules, to a mining lease over so much of the land included in the prospecting licence as the licensee desired and the Provincial Government thought fit to grant. The application, however, for the grant of the lease was to be made before the determination of the term of the licence and, if such application was duly made, the term of the licence was to extend for the further period till the date on which the lease was granted or the date which was prescribed by the Collector in his discretion. Soon after the grant of the licence, the firm made an application on the 20th September, 1948, for the grant of a mining lease for 30 years over the entire land. The mining lease was not granted and the firm applied to the Collector of Dehra Dun that the period of the prospecting licence be extended to the date of the execution of the deed. Neither was the term of the prospecting licence extended, nor was a mining lease granted to the firm. On the other hand, on the 28th June, 1949, the Collector of Dehra Dun wrote to the firm a letter purporting to cancel the licence.

The firm, however, continued to exercise its alleged rights under the prospecting licence and made representations to the State Government and the Central Government for the execution of the mining lease. The mining lease, however, was not executed and a writ petition was moved in this Court under Article 226 of the Constitution praying *inter alia* for the issue of a writ in the nature of mandamus, commanding the State of Uttar Pradesh to execute a mining lease in favour of the

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firm for a term of 30 years. This petition was opposed by the State on a number of grounds, including the ground that the 1940 Rules did not apply to lime stone, and most of those grounds were considered and decided by a Bench of this Court by its judgment dated the 8th December, 1953. The decision on other points was in favour of the firm, but on the question whether the 1940 Rules were applied by the State Government, the Court was not satisfied that they were so applied to lime stone. The rules did not apply by their own force to a mining lease for excavating lime stone, and the question whether the State Government had applied those rules to lime stone was a question of fact which depended upon evidence. The material before the Court was not considered to be sufficient for deciding the question, and the Bench decided to issue a writ in the nature of mandamus in the alternative. The State Government was either to grant the lease or to show cause why the same be not granted. The State Government decided to show cause against the grant of the writ and by their application dated the 7th January, 1954, averred that the 1940 Rules had never been applied by the State Government to leases for excavating lime stone. Subsequently a number of applications were made on behalf of the firm to the effect that no proper cause had been shown by the State Government against the issue of the writ and that the State Government be directed to disclose the documents which appertained to the point in controversy and to allow inspection of a number of files.

After a protracted trial a Bench of this Court finally held by its judgment, sought to be appealed against, that it was not proved in the case that the 1940 Rules were ever applied by the State Government to the grant of mining leases in respect of lime stone. The Bench held that there was no statutory obligation on the State Government to grant a mining lease in respect of the minor minerals such as lime stone, but that the State Government was bound to grant a mining lease with respect to other minerals mentioned in the prospecting licence issued to the firm. The lease, however, was to be subject to the 1940 and 1949 Rules and the terms

of the prospecting licence. They directed the issue of a writ accordingly. The firm appears to be aggrieved by this order of the Bench because the most important mineral appears to be lime stone, and the firm's claim for the issue of a writ of mandamus to the State Government to grant a mining lease with respect to lime stone has been disallowed by this Court.

As already stated, the application seeks to obtain a certificate both under Article 132(1) and 133(1) of the Constitution. We think that the applicant firm is not entitled to a certificate under Article 132(1) but that it is entitled to a certificate under Article 133(1). The learned counsel for the firm seeks to bring the case under Article 132(1) on the ground that the firm had a fundamental right to obtain the lease and in proceedings under Article 226 of the Constitution it was incumbent upon the High Court to grant the prayer for the issue of a writ of mandamus protecting the firm's fundamental right. The learned counsel has urged that under the prospecting licence the firm has entered into possession of the land, that it was entitled to apply for the grant of a lease, which the firm did within the period allowed in the licence, and that there is thus a vested right in the firm to obtain the lease. This vested right to obtain the mining lease is said to have the status of a fundamental right and protected by Articles 19(1)(f) and 31 of the Constitution. Emphasis is laid on the fact that the firm is actually in possession of the land and, it having exercised the option within time, its right is as good as the right of a lessee. Before proceeding to consider this argument, the position may first be made clear that the lease, which the firm seeks to obtain, is not like the ordinary lease for possession of immoveable property. The prospecting licence or the lease does not confer any exclusive right of possession over the demised land. It only confers an exclusive right to excavate the minerals mentioned in the licence. The licence gives a right to what may be called a *profit a prendre* and similar is the position of a lease under the rules.

The Bench has not given any decision on the question whether the right of the firm is a fundamental one

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or not, though a reference has been made to the claim, in the previous judgment as also in the last one. We find it difficult to uphold the contention of the learned counsel that the right to obtain this sort of lease can be said to be a right which has been given the status of a fundamental right. The rights under the prospecting licence are not the subject matter of the proposed appeal to the Supreme Court, and it is admitted that the firm is in continued enjoyment of the rights under the prospecting licence. That licence gives it a right to obtain a lease, but as long as no lease is actually executed, the rights as a lessee do not come into existence, and the right to obtain a lease may be a claim to obtain a right, which may have the status of being a fundamental one, when it has been obtained, but the mere right to obtain such a right, in our opinion, does not have the status of a fundamental right. It may be a contractual right and may, in some cases, be also a statutory right, but we are of the opinion that this particular right is not the one which is sought to be protected by Article 19 or Article 31 of the Constitution. The mining lease, when obtained, as also the present prospecting licence, confer a right to a *profit a prendre*, which has been defined in Halsbury's Laws of England, second edition, Vol. II, at page 381, as a right to take something off land of another person or a right to enter a land of another person and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right. These rights have been regarded as incorporeal hereditaments capable of being created only by deed. The lease, even after it has been granted, would not create any right in the land, much less can it be said that the right to obtain such a lease creates any right in the land. The right being merely one to obtain such a lease, I do not think it is a right which has been protected by Article 19 (1) (f) of the Constitution.

In the *State of Bombay v. Bhanji Munji* (1) their Lordships observed that Articles 19 (1) (f) and 31 dealt

(1) A. I. R. 1955. S.C. 41

with different subjects and covered different fields and there was no overlapping. They then proceeded,

"We need not examine those differences here because it is enough to say that Article 19 (1) (f) read with clause (5) postulates the existence of property which can be enjoyed and over which rights can be exercised because otherwise the reasonable restrictions contemplated by clause (5) could not be brought into play."

Further on,

"These Articles deal with substantial and substantive rights and not with illusory phantoms of title. When every form of enjoyment which normally accompanies an interest in this kind of property is taken away leaving the mere husk of title, Article 19 (1) (f) is not attracted."

What the firm claims in the present proceedings is that it has a right to obtain a mining lease, and a right like this is a right in the abstract which cannot be enjoyed excepting after it has been granted and has fructified into a lease.

The facts of the case of *Anand Bahera v. State of Orissa* (1) are very much similar to the facts of the present case. The dispute in that case was with respect to fishery rights in a lake situate in Orissa and, after the abolition of Zamindaris, the State refused to recognize these rights. A petition under Article 32 of the Constitution was then filed before the Supreme Court and it was averred that the fundamental rights of the petitioners under Articles 19 (1) (f) and 31 (1) had been or were about to be infringed. The Supreme Court held that the right to catch and carry away the fish amounted to a licence to enter on the land coupled with a grant, and it was a *profit a pendre*. To the argument that a contract was property their Lordships replied that even if it be assumed that it was a kind of property, the State of Orissa had not taken away the contract or prevented

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the licensees from acquiring, holding or disposing of the contract. The licensees were free to sue on it and assign on it if they wanted to do so. The State refused to recognize the said contract. It was held,

"If the State is wrong in its attitude, that may give rise to a suit against it for damages for breach of contract or possibly, (though we do not say it would), to a right, to sue for specific performance ; but no question under Articles 19 (1) (f) and 31 (1) can arise because the State has not confiscated or acquired or taken possession of the contract as such."

I think that the same is the position with respect to the alleged right of the firm to obtain a mining lease. The right may be there in the firm, but the State is not interfering with that right as such, nor is it taking away that right from it. The State is only refusing to recognize the right or to give effect to it and, if the State is wrong in its attitude, the firm may have a right to bring a suit for damages or breach of contract or for specific performance, but no question under Article 19 or Article 31 can arise. I think this case, (*Anand Bahera's*) is an authority which negatives the contention of the firm entirely that any fundamental right of the firm under Article 19 or Article 31 is being interfered with. Article 31 further has no application to the case because the State Government is not acquiring the alleged right of the firm to obtain the lease.

For the above reasons, I am unable to certify that the case involves substantial questions of law as to the interpretation of the Constitution.

Coming now to Article 133 of the Constitution, the main question for decision is whether the proceedings in this Court under Article 226 of the Constitution were "civil proceedings" or not, within the meaning of expression as used in Article 133. Under clause (1) of Article 133 an appeal lies to the Supreme Court from a judgment, decree or final order in a civil proceedings of a High Court, if the High Court certifies that the

amount or value of the subject matter of dispute in the court of first instance and still in dispute on appeal was or is not less than Rs.20,000; or the judgment, decree or final order involves directly or indirectly some claim or question respecting the property of the like amount or value. Where the judgment, decree or final order appealed from affirms the decision of the court immediately below, the High Court should further certify that the appeal involves some substantial questions of law. The High Court may also otherwise declare the case as a fit one for appeal to the Supreme Court. It has not been denied on behalf of the respondents that the judgment under appeal involves directly or indirectly claim or question respecting property worth not less than Rs.20,000. As a matter of fact, the right in dispute is a very valuable one and, if the firm succeeds in getting 30 years' lease, it would earn lacs of rupees. I am thus satisfied that the judgment under appeal does involve claim respecting property of more than Rs.20,000. The court of first instance in this case is the High Court itself, and this is not a case to which the last paragraph of Article 133 (1) has any application. That paragraph only applies where the judgment, decree or final order appealed from affirms the decision of the court immediately below the High Court. The paragraph would not apply where the High Court does not affirm the decision of the court below it, nor would it apply to a case where the question of affirming or not affirming the decision does not arise at all. An appeal thus lies, as a matter of right, to the Supreme Court, provided the judgment sought to be appealed against has been given in a "civil proceeding".

The expression "civil proceeding" has not been defined anywhere in the Constitution, and the interpretation of the expression has given rise to a great deal of controversy in the different High Courts, and the cases even of the same High Court on the point cannot always be reconciled. The position would have been less difficult if the proceedings, contemplated by the Constitution, were only of two kinds, namely, civil and criminal. But in Article 132 besides mentioning civil

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and criminal proceedings, the expression "other proceeding" has also been used. This makes it clear that all the proceedings before the High Court are not divided into civil and criminal, and there may be proceedings conducted in the High Court, which are neither civil, nor criminal. An appeal lies to the Supreme Court from a judgment, decree or final order of a High Court, whether it is given in civil, criminal or other proceedings, if the High Court certifies that the case involves substantial question of law as to the interpretation of the Constitution. Where the question involved is a question of interpretation of the Constitution, an appeal lies to the Supreme Court on a certificate given by the High Court in all the three kinds of cases.

Article 133 of the Constitution then deals with cases of civil proceedings in which an appeal lies to the Supreme Court, and Article 134 deals with cases of criminal proceedings. Article 135 invests the Supreme Court with power to decide matters which the Federal Court had jurisdiction to decide them. Article 136 authorizes the Supreme Court to grant special leave to appeal from "any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India". Instead of "proceeding" the expression used here is "any cause or matter". I do not think much turns on the difference in the use of the word "proceeding" in Articles 133 and 134, and the word "cause or matter" in Article 136, because in Article 135 it has been said that the Supreme Court shall have jurisdiction and power with respect to any matter to which the provisions of Article 133 or Article 134 do not apply. According to the language used in Articles 133 and 134, they apply to civil and criminal proceedings respectively and those very proceedings have been referred to as "matter" in Article 135. The word "proceedings" in Articles 133 and 135 has been used in a wide sense, and more or less has the same connotation as the word "case" in section 115 of the Civil Procedure Code.

The main question is whether the proceeding out of which this application for grant of certificate arises

was a "civil proceeding" or not. This Court has in some cases assumed that the proceedings under Article 226 of the Constitution, if arising out of civil matter, are civil proceedings and in some unreported cases it is actually held that these proceedings are civil proceedings. Reference in this connexion may, however, be made to only one unreported case, namely, the case of *Collector of Mirzapur v. Firm Goverdhan Das Kailash Nath* (1) in which it was held that the proceedings under Article 226 of the Constitution were civil proceedings.

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The question again arose in the case of *State of Uttar Pradesh v. Mukhtar Singh* (2). The point, it appears, was fully argued for the first time in this Court, but the learned Judges, constituting the Bench, were of contrary opinions. Mr. Justice DESAI was of the opinion that no proceeding under Article 226 of the Constitution can ever be said to be a civil proceeding. Mr. Justice BEG took the view that a civil proceeding is one which is taken for enforcement of a civil right and whether a proceeding was civil or not depended on the nature of the subject matter of the proceeding and not on the mode adopted or the forum provided for the enforcement of the right. The question really arose on an application under Order XLV, rule 13, Civil Procedure Code, made by the applicant in the case for staying the operation of the judgment of this Court. Mr. Justice BEG was of the opinion that on the merits of the application, the applicant was not entitled to any order under Order XLV, rule 13, Civil Procedure Code. The application was accordingly dismissed.

The High Court at Orissa has recently held in the case of *Jagannath Agarwala v. State of Orissa* (3), that a proceeding under Article 226 of the Constitution was a civil proceeding, if it was with respect to a claim in assertion of a civil right.

The question whether an application for information in the nature of a *quo warranto* is in the nature of a

(1) Supreme court appeal no. 62 of 1956, decided on 14th November, 1956.

(2) A. I. R. 1957 All. 505.

(3) A. I. R. 1957 Orissa 42.

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civil proceeding arose for decision before the Privy Council in the case of *Hamid Hasan Nomani v. Banwarilal Roy* (1), and the Privy Council answered the question in the affirmative.

Some help may also be derived from a decision of the Supreme Court in the case of *Province of Bombay v. Khushaldas S. Advani* (2). One of the questions that arose in the case was whether a right, granted by section 306 read with section 176 of the Government of India Act, 1935, to sue the Provincial Government would include within it the right to apply for the issue of a writ of certiorari. Mr. Justice MAHAJAN said in paragraph no. 51 of the Report,

"The expression 'sue' means 'the enforcement of a claim or a civil right by means of legal proceedings'. When a right is in jeopardy, then any proceedings that can be adopted to put it out of jeopardy fall within the expression 'sue'. Any remedy that can be taken to vindicate the right is included within the expression."

The right to sue was held to include the right to take proceedings for the issue of a writ of certiorari.

The exact question has been recently considered by the Punjab High Court in great detail, if I may say so with respect, in the unanimous decision of a Full Bench in the case of *Sardar Kapura Singh v. Union of India* (3). The Full Bench expressed the opinion that it would depend on facts and circumstances of each case whether the proceeding under Article 226 of the Constitution was a civil proceeding or not. Generally, a civil proceeding may be defined as a judicial process to enforce a civil right and includes any remedy employed to vindicate that right. It covers every step in an action and is equivalent to an action. It is a prescribed course of action for enforcing a legal action and embraces the requisite steps by which judicial action is invoked. Reference in this case has been made to a number of English cases and also some American cases, and no

(1) A. I. R. 1947 P. C. 90.

(2) A. I. R. 1950 S. C. 222.

(3) A. I. R. 1957 Punj. 173.

useful purpose would be served by referring to them again in this judgment. The English cases mostly are cases in which the court of appeal had to decide whether the proceeding was a criminal one or not, because the maintainability of appeal depended on the case being a criminal case. In deciding those cases, valuable observations have been made, which have been quoted in the judgment and relied upon.

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The question has arisen for decision in a number of cases before the Supreme Court of America also and observations have been made in those cases which go entirely to support the view that proceedings for the issue of writ would be civil proceedings, if the subject matter of the proceedings is a civil right. As regards these American cases, it has been said that in America there are only two categories of cases under the relevant section, and the categories are of criminal and civil cases. So, any case which was not a criminal case had to be treated as a civil one. But I do not think that this argument is sufficient for disregarding the decisions of the American Courts, because, in some of those cases at least, the learned Judges have carefully considered what a civil proceeding is and they have not gone on the ground that because the proceeding is not criminal, therefore, it must be taken to be civil. Reference in this connexion may be made only to the case of *Hartman v. Greenhow* (1). Mr. Justice FIELD has said at page 273,

“The judgment denying the writ of mandamus was a final determination against the claim of the petitioner to have the coupons held by him received for taxes without a deduction from their face value of the amount of the tax levied on the bonds. A mandamus in cases of this kind is no longer regarded in this country as a mere prerogative writ. It is nothing more than an ordinary proceeding or action in which the performance of a specific duty, by which the

(1) 26 L. Ed. 271.

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rights of the petitioner are affected, is sought to be enforced."

A quotation is then made from an earlier case in which Chief Justice TANAY had observed that the writs came into use by virtue of prerogative power in the English Crown and were subject to regulations and rules which have long since been "disused"; but the right to the writ and the power to issue it had ceased to depend upon any prerogative power, and it was now regarded as an ordinary process, in cases to which it was applicable.

The only clear authority in favour of the State is the decision of a Full Bench of the High Court at Patna in the case of *Collector of Monghyr v. Maharaja Pratap Singh Bahadur* (1). The learned Judges have gone to the length of holding that no proceeding taken under Article 226 of the Constitution can ever be a civil proceeding within the meaning of the expression as used in Article 133 of the Constitution. The main reason for arriving at this conclusion appears to be that, in the opinion of the learned Judges, the jurisdiction under Article 226 is an extraordinary jurisdiction, which was vested not for the purpose of declaring the civil rights of the parties but for the purposes of ensuring that the law of the land was implicitly obeyed and that the tribunals and public authorities were kept within the limits of their jurisdiction. To put it in their own words,

"In other words, the jurisdiction of the High Court under Article 226 is a supervisory jurisdiction, a jurisdiction meant to supervise the work of the tribunals and public authorities and to see that they act within the limits of their respective jurisdiction.

In a proceeding under Article 226, the High Court is not concerned with the determination of the civil rights of the parties; the only object of such a proceeding under Article 226 is to ensure that the law of the land

(1) A. I. R. 1957 Pat. 102.

is implicitly obeyed and that various authorities and tribunals act within the limits of their respective jurisdiction."

Mention was also made of the fact that these writs were known as prerogative writs in the English law and they were specially associated with the King's name, and the theory was that the King himself must superintend the due course of justice through his own courts. It was also observed that our Constitution has borrowed the power to issue these writs from the English law.

Whatever may have been the origin of the writ jurisdiction of the King's Bench Division in England, the position at the time that the Constitution of India came into force was very different. Even in England, the writs, as such, had been abolished and in their place powers were granted to the High Courts to issue corresponding orders. Even before the formal abolition of the rights to issue the writs, the writs were treated in many cases as dealing with civil rights of the parties. We have already mentioned above that in America they have since long been treating the writ jurisdiction as a jurisdiction dealing with civil rights of the parties and, though they borrowed the writs from the English law, they did not always regard them as other than civil proceedings, (if they determined civil rights), simply because in the land of their origin at some time they were regarded as prerogative writs. I think that the position in India is the same as it was in America and the power to issue these writs in India is granted to the High Courts by the Constitution, and not by virtue of the fact that the King had in theory authorized his courts to issue these writs.

Ferris in his book on the "Law of Extraordinary Legal Remedies" says at pages 220 and 221,

"At common law mandamus was prerogative remedy, issued in the name of the sovereign to prevent disorder from a failure of justice and defect of police; and while it has been termed such by the courts of this country in early decisions, and properly

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characterized as one of the highest writs known to our jurisprudence, it is generally held to have lost its prerogative character, being now merely a civil action or proceeding to enforce a legal right. Especially is this so because of our form of Government."

Earlier at page 220 it has been stated that although mandamus issues in the name of the King and in the name of the State in America, and although it may be said to partake somewhat of a criminal nature,

"It is, nevertheless, a civil remedy for the protection of civil rights."

Bailey in his book on "Habeas Corpus and Special Remedies", Vol. II, at page 773, says,

"It would not be profitable to the reader to give an historical review of this ancient writ and remedy in this work, or in detail to trace its transformation in this country from the high prerogative writ of England to what it is now in modern practice—other than in exceptional cases—an action in law between the parties. The right to the writ and the power to issue it has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable."

Lower down it is said that the judgment in such a case stands like the judgment of an ordinary action at law, subject to review under similar conditions. There can thus be no doubt that in America writ of mandamus is treated as an action at law and it appears from the above quotations that in England also the position had become more or less the same, even before the right to issue the writs by their name was abolished by the Parliament in England. In India, I think, there can be no question of the writs being issued under the prerogative of His Majesty and here they partake of the nature of the writs in America.

In Halsbury's Laws of England, second edition, Vol. 9, it is stated at page 794,

"The applicant for the writ of mandamus may plead to the return thereto within such time and in like manner as if the return were a statement of defence delivered in an action. The pleading and all subsequent proceedings, including pleadings, trial, judgment and execution, proceed and may be had and taken as if in an action ;

The parties may concur in stating any question of law in the form of a special case for the opinion of the court, or the court or a judge may order a case to be so stated."

The procedure indicated above would show that even in England the proceedings were treated as proceedings in an ordinary civil action. The decision on writs of mandamus are subject to review by court of appeal, and the rules of the Supreme Court of England as to appeals to the court of appeal apply to all civil proceedings on the Crown side, including mandamus. Even in England it would thus appear, for all practical purposes, that a writ of mandamus at least is treated as an ordinary civil action, and there is no reason why I should continue to treat these writs, including writs of mandamus, as the old high prerogative writs issued by the King's Bench in England.

Article 227 of the Constitution speaks of powers of superintendence by this Court, and even the powers exercised under Article 226 may be spoken of as supervisory powers. The powers are supervisory in the sense that the High Court can see that the subordinate tribunals keep within the limits of their jurisdiction, but, apart from that, the High Court can also deal with the rights, when the question is raised before the High Court.

It appears to be very anomalous to hold that, if one citizen moves a writ petition against a District Board

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challenging the legality of a bye-law framed by the Board, which affects the civil rights of the applicant; and another citizen, similarly situate, brings a suit in the regular civil court praying for the same relief; then if the High Court decides in first appeal the case of the person, who brought the case in the court of the Civil Judge, the proceedings should be taken to be civil proceedings; whereas the case of the other man, similarly situate, who brought a petition under Article 226 of the Constitution, should not be taken to be a civil proceeding.

The standing counsel said that the proceedings under Article 226 of the Constitution should be taken to be constitutional proceedings and not a civil proceeding, even though they may determine civil rights. On the same analogy, it might be argued that, if a civil suit pending in the Civil Judge's court is transferred to the High Court under Article 228 of the Constitution, the case would be decided by this Court within its constitutional jurisdiction and not within its civil jurisdiction.

I do not think that Article 226 of the Constitution confers any jurisdiction of a type which can be classed under a separate head. The Article only confers additional powers on the High Court to issue certain writs, directions and orders of the nature more or less as were issued in England under the different prerogative writs. The conferment is of additional powers and not of a particular kind of additional jurisdiction. I think it would depend upon the nature of each case, decided under Article 226 of the Constitution, whether it was a civil, criminal or other proceeding. What is to be looked into is the nature and circumstances of the particular case, and the mere fact that it has been dealt with under Article 226 of the Constitution is not sufficient for saying that it is or is not a civil proceeding.

I respectfully agree with the decision of the Full Bench of the Punjab High Court in the case of *Sardar Kapur Singh*, referred to above, and hold that civil proceedings may be defined as a judicial process to

enforce a civil right and includes any remedy employed to indicate that right. The word "proceeding" covers every step in an action and is equivalent to an action. If the order of this Court is directed against a proceeding, which is criminal in character, that is, if the proceeding is carried to a conclusion which may end in imprisonment for an offence, then the proceeding in the High Court must be taken to be a criminal proceeding. But if the order is in regard to a proceeding which relates to determination of individual rights or redress to individual wrongs, then it will be a civil proceeding. If the proceedings are neither one, nor the other, then they will be "other proceeding" within the meaning of Article 132 of the Constitution. I am not called upon to decide what proceedings are embraced within the meaning of the expression "other proceeding", but it is possible that the other proceedings may be in the nature of disciplinary proceedings against the advocates, proceedings in the nature of contempt of court and other proceedings, which are neither civil nor criminal.

In the present case, the firm has prayed for the issue of a writ of mandamus to compel the Government to execute a lease for 30 years in its favour for purpose of excavating limestone, amongst other minerals. It says that the Government is bound to execute the lease and this Court has allowed the writ petition in part and commanded the State Government to execute the lease with respect to minerals other than limestone. The case was partly decided by this Court by its judgment, dated 8th December, 1953, when it issued an alternative writ. The parties were then permitted to treat the matter as a suit and to furnish such evidence as they liked to produce. The proceedings have throughout been of a civil nature partaking the nature of a civil action and we think that the judgment under appeal has been delivered in proceedings of a civil nature.

I have already indicated above that if the proceedings are proceedings of a civil nature, an appeal lies as a matter of right, as the valuation is not less than Rs.20,000 and in fact it is much more than that.

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I would, accordingly, certify under Article 133 (1) (b) that the judgment under appeal involves directly a question respecting property worth not less than Rs.20,000.

SRIVASTAVA, J. :—I have had the advantage of reading the judgment prepared by my learned brother. I agree that the applicant is entitled to a certificate under Article 133 (k) (b) of the Constitution. As, however, my point of view is slightly different, I would prefer to state my reasons in my own way.

The facts have been stated in detail by my learned brother and need not be repeated. On the 31st of July, 1948, the applicant obtained a prospecting licence in the form prescribed by the U. P. Mining Concession and Mineral Development Rules, 1940, (hereinafter to be referred to as the 1940 Rules). The licence was for a number of minerals and was to last for the period of a year. One of its terms provided that the applicant was to have the right, subject to the compliance with the rules, to a mining lease over so much of the land as he may desire and the Provincial Government shall think fit to grant, provided he applied for the grant of the lease before the expiry of the terms of the licence. It was further provided that if the application for a mining lease was made in time, the term of the licence was to be executed for a further term ending either with the grant of the lease or any other date as the Collector may in his discretion prescribe. This clause of the licence was in accordance with rule 33 of the 1940 Rules which clearly provided that—

“On or before the determination of his licence the licensee shall have a right—

- (a) in the case of minerals other than precious stones to a mining lease in accordance with the terms contained in the rules for mining lease.”

Taking advantage of this clause in his licence the applicant made the application for a mining lease on the 16th of March, 1951, within the prescribed time and claimed a lease in respect of the minerals mentioned in his licence. Under the 1940 Rules, minerals were

divided in two classes—major and minor. Lime stone which was the main mineral to be found in the area over which the applicant's licence extended was a minor mineral under those rules, and rule 6 of the rules provided that the rules shall not apply to minor minerals like lime stone and that the extraction of such minor minerals was to be regulated by such separate orders as the State Government may pass in the matter, having regard to the merits of each individual case. The request of the applicant for a mining lease was turned down by the State Government and it wanted to cancel the applicant's licence. The applicant then filed a petition under Article 226 of the Constitution, claiming a writ of mandamus commanding the State of Uttar Pradesh to grant him a mining lease. The main grounds on which the petition was based were that the right to get a mining lease in accordance with the terms of the licence which the applicant held was really a statutory right and that the omission of the State Government to grant the mining lease amounted to a violation of the applicant's fundamental right to property. The case of the applicant was that the right to get the mining lease was itself a property and the State Government could not deprive the applicant of that property except in due course of law. The claim of the applicant was contested by the State Government on various grounds. By an order dated the 8th of December, 1953, a Bench of this Court considered the petition and decided that the applicant was entitled to a writ in the nature of mandamus in the alternative. This order is reported in *Brij Lal v. The State of Uttar Pradesh* (1). It commanded the State to execute a mining lease for 30 years as desired by the applicant or to show cause to the contrary. The State Government did not execute the lease as directed and preferred to show cause. The main contention put forward on its behalf was that it was under no statutory obligation to grant a lease as claimed by the applicant. So far as lime stones were concerned, it was contended, the 1940 Rules did not apply by their own force and the State Government had never applied

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(1) A. I. R. 1954 All. 393.

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those rules to lime stone by any separate order. It was also pointed out that 1940 Rules were to be read subject to 1949 Rules which had been framed under the Mines and Minerals (Regulation and Development) Act, 1948, and there was a clear provision in the latter rules under which the State Government could refuse to grant a mining lease to a licensee. It was urged that at the most the applicant could rely on a contractual obligation entered in his licence, and that obligation could not be enforced by a writ of mandamus. By an order of this Court dated the 15th of January, 1957, this Court held that the State was under a statutory obligation to grant a lease in favour of the applicant in respect of minerals other than minor minerals mentioned in the applicant's prospecting licence. It directed the State by a writ of mandamus to grant such a lease to the applicant. It held further that the statutory obligation did not extend to a lease in respect of a minor mineral like lime stone. The 1940 Rules did not apply to lime stone by their own force and had not been extended to mining minerals like lime stone by any separate order. It, therefore, rejected the applicant's petition to that extent and refused to issue a mandamus to the State Government requiring it to grant a mining lease in respect of lime stone. It is against this latter portion of the order of this Court that the applicant now wants to appeal to the Supreme Court.

The present application has been filed both under Articles 132 (1) and 133 (1) of the Constitution and the prayer is that this Court should grant a certificate (1) that the case involves a substantial question of law as to the interpretation of the Constitution and is a fit case for appeal to the Supreme Court under Article 132 (1) of the Constitution, and (2) that the case is a fit one for appeal to the Supreme Court under Article 133 (1) of the Constitution.

Under Article 133 (1) (b) of the Constitution the applicant can appeal to the Supreme Court as of right if the High Court certifies, (a) that the appeal is from a judgment, decree or final order, (b) that such judgment,

decree or final order has been passed in a civil proceeding of a High Court in the territory of India, and (c) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property worth not less than Rs.20,000.

It is common ground between the parties that the order of this Court against which the applicant wants to prefer an appeal is a final order. It is further agreed that it involves directly or indirectly a claim or question respecting property worth not less than Rs.20,000. The first and the third conditions mentioned above are, therefore, clearly fulfilled. It is, however, contended on behalf of the State that as the proceeding in which the order against which an appeal is to be preferred was not a civil proceeding, no certificate can be granted to the applicant under Article 133 of the Constitution. The question is whether this contention is acceptable.

The term "civil proceeding" has not been defined in the Constitution or any other statute. The learned counsel for the State, however, pointed out that a perusal of Articles 132 to 136 of the Constitution showed that under Article 132 where an appeal involved a substantial question of law as to the interpretation of the Constitution, proceedings out of which the appeal could arise have been classified as civil, criminal or other proceedings. Article 133 deals with appeals arising out of civil proceedings. Article 134 deals with appeals arising out of criminal proceedings. Article 135 preserves the jurisdiction of the Supreme Court in respect of entertaining appeals which could have been filed in the Federal Court before the commencement of the Constitution. Article 136 empowers the Supreme Court to grant special leave for appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or Tribunal in the territory of India. He emphasized that the words used in Article 136 were "cause or matter", while those in Articles 132, 133 and 134 were "civil, criminal and other proceedings". A distinction, he contended, had, therefore, been made by the Constitution itself between civil proceedings, criminal proceedings and other proceedings. Proceedings

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under Article 226 or 227 of the Constitution were, according to him, not civil proceedings, or criminal proceedings, but fell under the category of other proceedings. These other proceedings, he urged, included revenue proceedings, taxation proceedings, constitutional proceedings, executive proceedings, administrative proceedings, contempt proceedings, disciplinary proceedings and various other kinds of proceedings which could not be easily classified either as civil or criminal. His argument, therefore, is that if a person wants to appeal to the Supreme Court against an order passed in proceedings under Article 226 of the Constitution, he must either fulfil the conditions of Article 132, or obtain special leave from the Supreme Court itself under Article 136 of the Constitution. No certificate, it is contended, can be granted to him by the High Court under Article 133 of the Constitution.

In the marginal notes of Articles 133 and 134 the expression "civil matters" and "criminal matters" respectively have been employed. In the Articles themselves the terms employed are "civil proceeding" and "criminal proceeding". In Article 136, the expression "cause or matter" is used. This difference in phraseology can, however, be easily explained on the ground that the object of the Constitution makers in framing Article 136 was to confer the widest possible powers on the highest court of the land to enable it to interfere and to do justice whenever it found necessary. It was, therefore, felt that the terms of Article 136 should be of the widest possible import. That is why we find that while Articles 132, 133 and 134 relate to decisions of the High Courts only. Article 136 is applicable to the decisions of any court or Tribunal. Appeals under Articles 132, 133 and 134 can be filed only against judgments, decrees or final orders. The Supreme Court can, however, grant leave in its discretion under Article 136 not only against judgments, decrees and final orders but also against any determination, sentence or order. The word "proceeding", which is derived from the same origin as the word "procedure", naturally brings to the mind some action in a court of law. On that account it was probably felt that

the import of that word may be considered to be limited and it may not be found very appropriate if used in connexion with tribunal which may not be performing the functions of a court. The expression "any cause or matter" which has obviously a much wider import than the word "proceeding" was, therefore, employed in Article 136 which applied to courts as well as tribunals. This difference in the expressions employed does not, however, help in solving the problem before us which is whether a proceeding started in a High Court for obtaining a writ of mandamus is a civil proceeding or not.

If Articles 132, 133 and 134 are read together, it becomes clear beyond doubt that the Constitution contemplates that all proceedings in the High Court should be classified in three categories—civil, criminal and other. But simply because proceedings were contemplated which were neither civil nor criminal, it does not appear to be possible to infer that proceedings for a writ of mandamus are not civil proceedings but fall under the category of other proceedings. The third category, namely, other proceedings, appears to be obviously meant to include those proceedings which may clearly fall outside the first two or which may not be capable of easy classification, e.g., contempt proceedings or court-martial proceedings or disciplinary proceedings. It is also possible that as the Constitution was being framed for all times to come, the words were put in to cover all classes of cases which the High Court may at any time be empowered to deal with but which may not necessarily be considered to be either "civil" or "criminal". The mere existence of this third category does not, however, absolve us from responsibility of considering the nature of each proceedings individually, before deciding under which of the three categories it falls. There is apparently no justification for assuming that mandamus proceedings are not civil proceedings and must be classified as other proceedings simply because there is a category of other proceedings.

In the absence of any definition of the expression "civil proceedings", the expression itself and the two words which constitute it should in my opinion be given

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either their ordinary dictionary meaning or the meaning which they had acquired in legal parlance in England and America before they were used in the Constitution. Considered from this point of view, it will be found that the word "civil" which is derived from the latin word *civis*, a citizen, when used in connexion with law usually means "concerning questions of private rights". Civil law thus usually denotes the body of rules which have to be observed by the citizens of a country because they are such citizens. The dictionary meaning of the word "proceeding" is "step taken in a legal action". According to Stround's Judicial Dictionary, the term "civil proceeding" means a process for the recovery of individual right or redress of individual wrong, inclusive in its proper legal sense of suits by the Crown. According to its ordinary and well-established meaning, therefore, a "civil proceeding" is an action or step in an action taken in a court of law by a person to vindicate or enforce his rights or to have a redress for a wrong done to him. This appears to be the meaning given to the expression "civil proceedings" in *Bradlough v. Clarke* (1). If that is the meaning which the expression is deemed to bear, the petition by the applicant made in the present case must be held to be a civil proceeding. By that petition the applicant wanted to have his right to have a mining lease vindicated and enforced on the ground that it was a statutory right. He in fact claimed it to be a fundamental right and wanted the State to be compelled to honour that right and not to set it at naught in the manner in which it wanted to do so.

It is practically conceded that so far as the proceedings for a writ of mandamus are concerned, in England as well as in America such proceedings have always been considered to be a civil proceedings. Thus it is observed in Halsbury's Laws of England, second edition, Vol. 9, at page 794,

"The applicant for the writ of mandamus may plead to the return thereto within such time and in like manner as if the return were a statement of defence delivered in

(1) L. R. [1877-78] 8 A. C. 354.

an action. This pleading and all subsequent proceedings, including pleadings trial, judgment and execution, proceed and may be had and taken as if in an action ;. . . .

The parties may concur in stating any question of law in the form of a special case for the opinion of the court, or the court or a Judge may order a case to be so stated."

An application for a writ of mandamus is thus treated on the same footing as an ordinary civil action.

The position in America is the same. Thus Ferris and Ferris in their book of the "Law of Extraordinary Legal Remedies" at pages 220 and 221 observe,

"At common law mandamus was a prerogative remedy, issued in the name of the sovereign to prevent disorder from a failure of justice and defect of police ; and while it has been termed such by the courts of this country in early decisions, and properly characterized as one of the highest writs known to our jurisprudence, it is generally held to have lost its prerogative character, being now merely a civil action or proceeding to enforce a legal right. Especially this is so because of our form of government."

It is, however, contended that in England as well as in America all proceedings are either civil or criminal. There is no third category of other proceedings. The fact that in those countries proceedings for a writ of mandamus are considered to be civil proceedings cannot, therefore, justify the conclusion that they should be regarded as civil proceedings under our Constitution also, which clearly contemplates a third category of proceedings, which are neither civil nor criminal. The contention appears to be unacceptable because in England as well as in America mandamus proceedings have not been held to be civil proceedings on the ground that they are not criminal proceedings. They have been held to be

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civil proceedings because of their nature and because they have been found to have all the features of a civil action.

In India, decisions on the point have not been uniform. In our own High Court, certificates have been granted under Article 133 in respect of appeals arising out of writ proceedings in a number of cases. In most of them it was assumed that the proceedings were civil proceedings within the meaning of Article 133. In Supreme Court Appeal no. 62 of 1956, (*The Collector of Mirzapur v. Firm Goverdhan Das kailash Nath*), decided on the 14th November, 1956, however, the question was specifically raised and a Division Bench took the view that proceedings under Article 226 of the Constitution were civil proceedings. Thereafter the question arose again but indirectly in *State of Uttar Pradesh v. Mukhtar Singh* (1). The application before the learned Judges in that case was not an application for a certificate but an application for the stay of operation of a writ pending appeal to the Supreme Court. Both the learned Judges who were dealing with the matter were agreed that on merits the stay order prayed for could not be granted. They, however, differed from each on the question whether proceedings under Article 226 could be considered to be civil proceedings. Mr. Justice DESAI took the view they could not. Mr. Justice BEG took a contrary view. As the learned Judges were agreed as to the dismissal of the application on merits, the discussion as to whether the proceeding under Article 226 could be considered to be civil proceedings was only academical and must be regarded as *obiter dicta*.

The Rajasthan High Court in *Nahar Singh v. The State of Rajasthan* (2) had before it an application for leave to appeal to the Supreme Court against the dismissal of a petition under Article 226 of the Constitution. By that petition the petitioner had challenged the validity of the Rajasthan Land Reforms and Resumption of Jagirs Act. It was held that the proceeding was

(1) A. I. R. 1957 All. 505.

(2) A. I. R. 1955 Raj' 56.

a civil proceeding as the petitioner had sought to enforce his civil rights in it.

In *Ram Chandra Reddy v. Shankaramma* (1) leave was granted to appeal to the Supreme Court under Articles 132 and 133 of the Constitution against the decision in a petition by which the validity of the Hyderabad Abolition of Jagir's Regulation had been challenged. It was held that the proceedings were civil proceedings because they were not of a criminal nature.

The High Court of Orissa has recently held in the case of *Jagannath Agarwala v. State of Orissa* (2) that a proceeding under Article 226 of the Constitution is a civil proceeding as it relates to a claim in assertion of a civil right.

A Full Bench of the Punjab High Court in *Kapur Singh v. Union of India* (3) considered the question at some length and arrived at the conclusion that "a civil proceeding may be defined as a judicial process to enforce a right and includes any remedy employed to vindicate that right. It covers every step in an action and is equivalent to an action. It is a prescribed course of action for enforcing a legal action and embraces the requisite steps by which judicial action is invoked". The learned Judges went on to hold that it was difficult to lay down for all cases as to what would be civil proceedings and what would be other proceedings. The case with which they were dealing was a case in which proceedings under Article 226 of the Constitution had been started by a public servant against whom an inquiry had been ordered under the Public Servants Inquiry Act. The order directing the inquiry was impugned. The petition had been dismissed. It was held that as the petitioner's civil rights had been determined, the proceedings were civil proceedings and he could get a certificate under Article 133 of the Constitution.

The question appears to have arisen in the Patna High Court, first of all, in *Tobacco Manufacturers (India) Ltd. v. The State* (4). That case had arisen

(1) A. I. R. 1953 Hyd. 131.

(2) A. I. R. 1957 Orr. 42.

(3) A. I. R. 1957 Punj. 173.

(4) A. I. R. 1951 Pat. 29.

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under the Behar Sales Tax Act. Differing from earlier decisions of its own court, the Full Bench in that case held by a majority of 2 to 1 that a reference made to the High Court under the Behar Sales Tax Act was not a civil proceeding for purposes of Article 133. SHEARER, J., was inclined to take a contrary view. Subsequently, the question whether proceedings under Article 226 of the Constitution were civil proceedings arose directly in *Gopeshwar Prasad Sahi v. The State of Behar* (1) and a Division Bench was of the opinion that the proceeding was a civil proceeding of the nature contemplated by Article 133.

In *Bakhtiarpur—Bihar Light Railway Co., Ltd. v. The District Board, Patna* (2) the question that arose was whether proceedings in contempt could be regarded to be civil proceedings, and it was held that though different views had been taken in respect of the nature of contempt proceedings, for the purpose of leave to appeal to the Supreme Court, it was a civil proceeding because the remedy to the petitioner could be given only by way of civil execution. In *Allan Berry & Co., Ltd. v. Income-tax Officer, Patna* (3) the petitioners had sought the quashing of their assessment under the Income-tax Act by a petition under Article 226 of the Constitution. That petition having been dismissed, they applied for a certificate under Article 133 of the Constitution for leave to appeal to the Supreme Court. It was held that the proceeding was "a revenue proceeding" and not a civil proceeding and the court refused to grant the certificate. The decision was affirmed later by a Full Bench of that High Court in *Collector of Monghyr v. Maharaja Pratap Singh Bahadur* (4). The view taken by the learned Judges in that case was that no proceedings taken under Article 226 of the Constitution could ever be regarded as a civil proceeding for purposes of Article 133.

The Nagpur High Court, in *Messrs. Shri Ram Gulab Das v. The Board of Revenue* (5) had before it

(1) A. I. R. 1951 Pat. 626.

(2) A. I. R. 1952 Pat. 23.

(3) A. I. R. 1956 Pat. 175.

(4) A. I. R. 1957 Pat. 102.

(5) A. I. R. 1954 Nag 1.

a reference made by the Board of Revenue under the Central Provinces and Behar Sales Tax Act. The question was whether an appeal could lie to the Supreme Court against the judgment given by the High Court in that reference. It was held that the proceeding was a revenue proceeding and a certificate under Article 132 could be given as the decision of the High Court amounted to a judgment. Article 133 of the Constitution did not come up for consideration.

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M. S. Krishnaswami v. The Council of the Institute of Chartered Accountants of India (1) was a case which arose in the Madras High Court under section 21 (2) of the Chartered Accountants Act and it was held that the proceedings not being civil proceedings, no certificate under Article 133 could be granted for an appeal being filed before the Supreme Court against the decision of the High Court.

No reported decision is available in which the Supreme Court has considered this question directly. It, however, entertained an appeal, *A. Thangal Kunju Musaliar v. Venkatachalam Potti* (2) from a decision of the Travancore High Court issuing a writ of prohibition against the income-tax authorities without raising an objection that the appeal could not lie under Article 133 of the Constitution.

In *Hamid Hasan Nomani v. Banwarilal Roy* (3) the question was raised whether proceedings in the nature of a *quo warranto* were civil proceedings and the view taken was that it was.

A perusal of the cases in which it has been held that writ proceedings cannot be considered to be civil proceedings will show that the reasons which weighed greatly with the learned Judges were these.

(1) When a category like other proceedings has been contemplated in the Constitution there is no reason why writ proceedings should not fall under that category. Article 225 of the Constitution recognizes and preserves the jurisdiction of the High Courts which they possessed prior to the commencement of the Constitution. That

(1) A. I. R. 1953 Mad. 79.

(2) A. I. R. 1956 S. C. 100.

(3) A. I. R. 1947 P. C. 90.

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jurisdiction was of two kinds—civil and criminal. Other special heads of jurisdiction mentioned in the various Letters Patents of the High Courts, e.g., matrimonial, testamentary and admiralty, etc., could easily fall under the category of civil jurisdiction. Articles 226 and 227 conferred a new kind of jurisdiction on the High Courts for the first time. Such a jurisdiction was more or less of a supervisory character and being a new kind of jurisdiction cannot be classified under the previously recognized heads of civil or criminal. It must, therefore, fall outside those categories.

(2) While exercising civil jurisdiction, the High Courts adjudicate upon private rights. Under Article 226 of the Constitution, however, no such rights are determined. As the learned Judges of the Patna High Court put it in the case of *Collector of Monghyr v. Maharaja Pratap Singh Bahadur* (1),

“In a proceeding under Article 226, the High Court is not concerned with the determination of the civil rights of the parties; the only object of such a proceeding under Article 226 is to ensure that the law of the land is implicitly obeyed and that various authorities and tribunals act within the limits of their respective jurisdiction.”

The jurisdiction exercised under Article 226 is, therefore, not civil but some other jurisdiction.

(3) The Code of Civil Procedure does not apply to proceedings under Article 226. A petition under the Article lies even if the civil suit is barred. The High Court cannot, therefore, be considered to be acting as a civil court while exercising its jurisdiction under Article 226. That being so, proceedings under that Article cannot be considered to be civil proceedings.

It has already been shown that merely because three kinds of proceedings are contemplated by Articles 132 to 134, it does not necessarily follow that a particular

(1) A. I. R. 1957 Pat. 102.

proceeding falls under a particular category. Whether a proceeding falls under one or the other of the three categories must be decided keeping in view the nature and essential features of that proceeding, the facts and circumstances which are to be determined in that case and the ultimate result to which the decision in the proceeding is to lead. Thus there may be proceedings under Article 226 which one will have to characterize as criminal proceedings without any hesitation, e.g., proceedings in which a conviction or commitment is sought to be quashed on the ground of want of jurisdiction or in which a writ of mandamus or prohibition is claimed for preventing continuance of a prosecution. It is also not difficult to conceive of proceedings under Article 226 which cannot be easily classified as civil or criminal, like proceedings relating to contempt of court or court-martial. Where, however, a petitioner seeks relief under Article 226 because his right of person or property are threatened or are being infringed, it is somewhat difficult to accept that the proceedings in which he is seeking to enforce his civil rights are not civil proceedings.

It is not strictly correct to say that Articles 226 and 227 have conferred a new kind of jurisdiction, supervisory or otherwise, on the High Court. Article 226 clearly declares that the High Court "shall have power" to issue directions, orders or writs within the territory over which their jurisdiction extends. The Article, therefore, confers not a new jurisdiction but only a new power. The power of superintendence mentioned in Article 227 was already there under section 107 of the Government of India Act of 1915, and section 224 of the Government of India Act, 1935. It is, therefore, not correct to say that when a High Court acts under Article 226 or 227 of the Constitution, it necessarily exercises a new kind of jurisdiction which is not necessarily civil or criminal.

It is true that in proceedings under Article 226 of the Constitution the High Courts attempt to see that laws are strictly obeyed and that the various authorities

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1957 and tribunals are kept within their bounds. That, how-
 BRIJ LAL ever, is only one of the several aspects of the matter. A
 SURI petition is entertained under Article 226 only when the
 v. petitioner has a grievance. He can have a grievance
 STATE OF only if he has a right which is being wrongfully infring-
 UTTAR ed, or if he is entitled to compel the respondents to per-
 PRADESH form a duty which they are bound to perform. In such
 Srivastava, petitions, therefore, it is almost always necessary for the
 J. courts to adjudicate on the civil rights of the parties. If determination of such rights can take place only in civil proceedings, many of the proceedings under Article 226 can be brought within that category.

The question whether the jurisdiction which the High Court exercises under Article 226 of the Constitution is a merely supervisory jurisdiction came up for consideration before a Full Bench of this Court in *Aidel Singh v. Karan Singh* (1) and it was held that though the powers exercisable under Article 227 are supervisory, the powers exercisable under Article 226 are not necessarily so. Those powers are judicial. Proceedings under Article 226 cannot, therefore, be excluded from the category of civil proceedings on the ground that only supervisory jurisdiction is exercised in those proceedings.

The fact that the Code of Civil Procedure does not apply to proceedings under Article 226 or that sometimes remedy under that Article is available even if regular suits are barred also does not appear to be sufficient to justify the conclusion that proceedings under the Articles are not civil proceedings. In his judgment in the case of *State of Uttar Pradesh v. Mukhtar Singh* (2) Mr. Justice DESAI at one stage tried to apply the test of the application of the Code of Civil Procedure for deciding whether a proceeding is a civil proceeding or not. He, however, found that the test was not a sure one and that, if it applied at all, it applied only in a negative way. BEG, J., however, pointed out in his judgment that the mode and the forum for the enforcement of a right could be altered, modified, abolished or created by ordinary law at any time. Each High Court

(1) A. I. R. 1957 All. 414.

(2) A. I. R. 1957 All. 505.

can frame rules in respect of the procedure it will follow while exercising jurisdiction under Article 226 and there appears to be nothing to prevent a High Court from framing a rule that the provisions of the Civil Procedure Code will apply *mutatis mutandis* to writ proceedings also. The question whether the proceeding is civil or not cannot, therefore, be decided on the basis of the application or non-application of the Code of Civil Procedure.

That the remedy under Article 226 is available even though a regular suit is barred also does not appear to be material for this purpose. Nor can the matter be left to depend on which of the various alternative remedies an aggrieved person chooses to follow for the redress of his wrong. If, for instance, two students are wrongly rusticated by a single order. One gets the order declared void and without jurisdiction in a regular suit. The other gets the same relief in writ proceedings. The questions raised and considered in both the proceedings being identical, can it be said that one is a civil proceeding and the other is not ?

It, therefore, appears to me that the correct approach to the question is the one pointed out by the Full Bench of the Punjab High Court in the case of *Kapur Singh v. Union of India* (1). No general rule or a universal test can be laid down for deciding whether a certain proceeding is a civil proceeding or not. Each case has to be considered on its own merits. If a proceeding is started to enforce or vindicate a civil right and if carried to its conclusion might result in an order finally determining the civil rights of the parties to the dispute, the proceeding will be a civil proceeding, whether it is under Article 226 of the Constitution or under any other provision of law.

Considered from the above point of view, the proceeding, in which the applicant wanted to enforce his right to have a mining lease in respect of lime stone on the ground that it was a statutory or fundamental right of which the State had no right to deprive him, must in my

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(1) A. I. R. 1957 Punj. 173.

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opinion be considered to be a civil proceeding for the purpose of Article 133 of the Constitution and if the other essentials of that Article are established, the applicant is entitled to the certificate that his is a fit case for appeal to the Supreme Court.

In this view of the case I think it unnecessary to go into the question, whether the applicant is entitled to a certificate under clause (1) of Article 132 of the Constitution also. It is urged on his behalf that the right to have the lease granted to him is itself a right in property which the applicant is entitled to hold and enjoy as a fundamental right and that the omission to grant the lease really amounts to an infringement of that right entitling the applicant to relief under Article 226 of the Constitution. I think it is unnecessary for the purposes of the present application to consider the correctness or otherwise of this contention. If, as appears to be the case, the applicant can appeal to the Supreme Court as of right under Article 133, he can press his contention in that Court and it is bound to receive the consideration it deserves. If it is apprehended by the applicant that unless he is given a certificate under Article 132, it will not be open to him to raise this constitutional question before the Supreme Court, the apprehension is entirely without foundation. Clause (2) of Article 133 clearly provides—

“Notwithstanding anything in Article 132 any party appealing to the Supreme Court under clause (1) may urge as one of the grounds in such appeal that a substantial question of law as to the interpretation of this question has been wrongly decided.”

Refused to decide the question in the applicant's favour can certainly be challenged as a wrong decision. The certificate under Article 133 thus entitles the applicant to raise in his appeal all questions including questions relating to the interpretation of the Constitution which he may like to raise. It is, therefore, not necessary to grant to him a certificate under Article 132 also.

For the reasons given above I agree to the order proposed by my learned brother.

By the Court—We certify under Article 133 (1) (b) of the Constitution that the judgment under appeal involves directly a question respecting property worth not less than Rs.20,000.

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Application allowed.

APPELLATE CIVIL

*Before Mr. Justice Bhargava and Mr. Justice Chaturvedi.**

MADAN LAL (APPELLANT)

v.

SYED ZARGHAM HAIDER AND OTHERS

(RESPONDENTS)

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Election—Election Petition—Application for amendment—Dismissal of the petition—Appeal, maintainability of—Corrupt practices, description and specification of—Allegation, vague—Representation of the People Act, 1951, ss. 83 (1), cl. b, 90 (5), 98, 123 (5), scope of.

There were three candidates for election for the U. P. Legislative Assembly from the Bahraich North 269 Constituency. Syed Zargham Haider, the respondent no. 1, was declared elected.

Madan Lal, a voter, filed this election petition before the Election Commissioner which was referred to the Election Tribunal at Gonda. Corrupt practices were enumerated in paras. 4 (a) to 4 (e) of the election petition. On 27th July, 1957, the respondent no. 1 filed his written statement alleging that paras. 4 (a) to 4 (e) were vague and were liable to be struck off. On 8th July, 1957, preliminary issues were framed, the main issue being whether the allegations contained in paras. 4 (a) to 4 (e) were vague and liable to be struck off. On 27th July, 1957, Madan Lal requested the Election Tribunal to make an order directing him to furnish better and further particulars of the corrupt practices contained in paras. 4 (a) to 4 (e) of the election petition. This application was rejected the same day. On 1st August, 1957, Madan Lal filed an application for amendment of these paragraphs of his petition. This amendment application was rejected by the Election Tribunal. On 28th August, 1957, the Tribunal heard the parties on the preliminary issues and held that the paras. 4 (a) to 4 (e) of the petition were liable to be struck off. After deleting these paragraphs, the Election Tribunal held that the petition disclosed no cause of action and there was no question of taking further proceedings in the trial. The Tribunal dismissed the petition. The order striking off paras. 4 (a) to 4 (e) of the petition and

*Sitting at Lucknow.

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the order dismissing the petition was one single composite order passed on 28th August, 1957. Madan Lal, the appellant, filed an appeal against this order to this Court under section 116 (A) of the Representation of the People Act.

Held, (i) that the order appealed against is an order under s. 98 of the Representation of the People Act and the Appeal is maintainable.

(ii) that the allegations of corrupt practices contained in paras. 4 (a) to 4 (e) of the petition mentioned corrupt practices committed by respondent no. 1 himself as well as corrupt practices committed by his agents and supporters. So far as corrupt practices alleged to have been committed by respondent no. 1 himself are concerned his election can be declared void merely on proof of commission of these corrupt practices. So far as the remaining corrupt practices alleged to have been committed by his agents and supporters are concerned, the appellant is required to allege and prove the further fact that the commission of these corrupt practices has materially affected the result of the election. There is no allegation in paras. 4 (c) to 4 (e) that any of these agents and supporters committed the corrupt practices with the consent of the respondent no. 1 or his election agent. In these circumstances all the allegations which have been made in paras. 4 (c) to 4 (e) of the petition as well as the allegations which appear in the application for amendment moved by the appellant which relate to the commission of these corrupt practices by the agents and supporters of respondent no. 1 must be ignored. All the pleadings regarding these corrupt practices become irrelevant because in the absence of the allegations that these corrupt practices had materially affected the result of the election they cannot be grounds for setting aside the election of respondent no. 1. The result is that the contents of paras. 4 (c) to 4 (e) can only be examined to the extent that they contain allegations of commission of corrupt practices of respondent no. 1 alone.

(iii) that under s. 123 (5) of the Representation of the People Act a corrupt practice is committed not by conveying the voter but by the act of hiring or procuring the conveyance. Clause (b) of s. 83 (1) requires the setting forth of at least three particulars, viz. (1) the names of the parties alleged to have committed the corrupt practice, (2) the place, and (3) the date of commission of the corrupt practice. In the absence of allegations of these particulars the corrupt practices alleged are vague and it is not possible for the respondent to meet the allegations made and the Tribunal was justified in striking off the pleadings contained in paras. 4 (a) and 4 (b) of the petition.

(iv) that the allegations that the respondent no. 1 used national symbols such as the national flag in the constituency

which was prohibited by law is also vague as no particulars are given and Tribunal was right in rejecting this also.

(v) that where the delay is not such as to disentitle the appellant from seeking the amendment, the amendments or modifications in the Election petition are to be permitted under section 90 (5) of the Representation of the People Act.

(vi) that where the appellant wanted to rely on the corrupt practice of making systematic appeals to the Mohammadan electors to vote and to refrain from voting on grounds of community with the sole purpose of exciting their religious susceptibilities and has given sufficient particulars as required by law, it would have been more helpful to the respondent for the purpose of meeting the charge brought against him but it is not mandatory under s. 83 of the Representation of the People Act for the appellant to reproduce the exact words. The language used in paras. 4 (c) gives a clear indication of the nature of the appeals that were made.

First Appeal no. 73 of 1957, from a decree of B. Banerji, Member, Election Tribunal, Gonda, dated the 28th August, 1957.

The facts appear in the judgment,

M. P. Srivastava and *Umesh Chandra* for appellant.

Saraswati Prasad and *Ali Hasan* for respondent no. 1.

The judgment of the Court was delivered by—

BHARGAVA, J. :—This is an appeal under section 16-A of the Representation of the People Act, 1951, as amended up-to-date. An election was held for the U. P. Legislative Assembly from the Bahraich North 269 Constituency. There were three candidates for election to the seat who are the three respondents in this appeal. Respondent no. 1 Syed Zargham Haider *alias* Mijjan Hian was declared as the successful candidate. The actual polling took place on 25th February, 1957, and the result of the election was declared on 2nd March, 1957. The appellant, Madan Lal, who was a voter but had not stood as a candidate, filed his election petition before the Election Commission on 16th April, 1957, which was the last date of limitation prescribed for presentation of election petitions under the Act. The Election Commission entrusted this petition for trial to the Election Tribunal at Gonda and fixed 12th June, 1957, as the date of appearance of parties before the tribunal.

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The election of respondent no. 1 was challenged by the appellant on the ground of corrupt practices which were enumerated in paras. 4 (a) to 4 (e) of the petition. On 27th June, 1957, the respondents filed their written statements. Respondent no. 1, amongst other pleas, put forward the defence that all these paras. 4 (a) to 4 (e), in which corrupt practices had been alleged were vague and were, therefore, liable to be struck off. On 2nd July, 1957, permission was granted to the appellant to file a replication which was actually filed on 8th July, 1957. On the same date, preliminary issues were framed—the main preliminary issue being whether the allegations contained in paras. 4 (a) to 4 (e) were vague and liable to be struck off. 20th July, 1957, was fixed for arguments on these issues but the hearing was adjourned to 27th July, 1957. On that date, the appellant moved an application requesting the Election Tribunal to make an order directing him to furnish better and further particulars of the corrupt practices which had been alleged in paras. 4 (a) to 4 (e) of the petition. That application was rejected the same day. On 29th July, 1957, arguments were heard on the preliminary issues and thereafter the appellant presented an application requesting for a week's time in order to file an application for amendment of these paragraphs. On 1st August, 1957, before the preliminary issues could be decided, the appellant moved an application for amendment of these paragraphs of the petition. Objections to this application for amendment were presented by respondent no. 1, on 14th August, 1947. Parties were then heard on 26th August, 1957, on the amendment application, which was rejected by the Election Tribunal. On 28th August, 1957, the Tribunal heard the parties on the preliminary issues and held that all the paras. 4 (a) to 4 (e) of the petition were liable to be struck off. The Tribunal, therefore, struck off those paragraphs. Thereafter, the Tribunal proceeded to examine the petition as it remained after these paragraphs had been deleted and came to the view that the petition disclosed no cause of action and there was, therefore, no question of taking further proceedings in the trial. The

Tribunal, therefore, dismissed the petition and awarded costs against the appellant to respondent no. 1. The order striking off paras. 4 (a) to 4 (e) of the petition, as well as the order dismissing the petition, was one single composite order passed on 28th August, 1957. It is against this order that the appellant has come up in appeal to this Court under section 116-A of the Representation of the People Act.

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When this appeal came up for hearing, a preliminary objection was taken by learned counsel for respondent no. 1 that this appeal was not maintainable as the order, dated the 28th of August, 1957, was not an order under section 98 or 99 of the Representation of the People Act and the right of appeal to this Court under section 116-A of the Act had been granted only against orders passed under section 98 or 99 of the Act. The contention of the learned counsel was that by the order of the 28th August, 1957, the petition had been decided at an early stage and not at the conclusion of the trial, whereas orders under section 98 of the Representation of the People Act can only be passed at the conclusion of the trial. In our opinion, this preliminary objection cannot prevail. If we confine our attention to the provisions of the Representation of the People Act only, we find that, under that Act, there are only two provisions under which an election petition can be dismissed by the Election Tribunal. There is firstly the provision in sub-section (3) of section 90 of the Act which contains a mandatory direction to the Tribunal to dismiss an election petition which does not comply with the provisions of section 81, section 82 or section 117, notwithstanding that the petition may not have been dismissed by the Election Commission under section 85. The only other provision for dismissing a petition is that contained in section 98. It has not been contended by learned counsel for the respondents, nor could it possibly be urged, that the present order, dated the 28th of August, 1957, dismissing the election petition, is or can be an order under sub-section (3) of section 90 of the Representation of the People Act. If, therefore, the provisions of this Act alone are examined, it would

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have to be held that the dismissal order must be an order under section 98 of the Act, which is the only other provision under which an order of dismissal can be passed. It was, however, urged by learned counsel that, in considering the stages at which an election petition can be dismissed, the Court should not confine itself to the provisions of the Representation of the People Act. Since the Code of Civil Procedure has been made applicable to the trial of an election petition by an Election Tribunal, the principles laid down in that Code must also be examined in order to see whether a particular order of dismissal is an order at the conclusion of the trial or is an order at an earlier stage. This Court in *Bhudhar Lal v. Bansidhar Shukla* (1) and *Smt. Godavari v. Shiv Prasad Nagar* (2), Lucknow Bench, has already held that an order under sub-section (3) of section 90 of the Representation of the People Act, dismissing an election, is not an order at the conclusion of a trial and an appeal against such an order does not lie under section 116-A of the Act. The learned CHIEF JUSTICE, before whom the case came up on a difference of opinion between the other two learned Judges who heard the appeal, distinguished between an order by which a petition had been dismissed *in limine* and an order dismissing a petition after the hearing of the petition. The former was held to be an order which itself concluded the trial, whereas the latter an order made at the conclusion of the trial. In the case before us, the order which was passed by the Election Tribunal, dismissing the election petition on 28th August, 1957, did not conclude the trial *in limine*. It was not a case where the petition was dismissed on a preliminary ground before the trial had begun. In fact the proceedings taken before the Election Tribunal show that a part of the trial was gone through before the order was made. The parties had appeared before the Tribunal. The respondents had filed their written statements. The appellant had filed a replication. There was an application for amendment of the pleadings and that application was also

(1) First appeal no. 64 of 1957. (2) First appeal no. 65 of 1957.

dismissed. The pleadings in paras. 4 (a) to 4 (e) of the petition were then struck off. It was subsequent to all these proceedings that the order of dismissal of the petition was made by the Tribunal. This order, therefore, was an order which was made after the trial had already commenced. An order under sub-section (3) of section 90 of the Act is an order made before the commencement of the trial. It may be, of course, that in some cases such an order might be made after the trial had commenced, but the provision for dismissal has clearly been made with the purpose of excluding a trial by dismissing the petition. The order in the present case is of a different nature because the ground for that order arose after a part of the trial had been gone through. It was not till the written statement had been filed, application for amendment had been dismissed, arguments about the vagueness of some paragraphs had been heard and decided by the Tribunal and the Tribunal had struck off these paragraphs, that occasion arose for dismissing the petition on the ground of want of cause of action. As has been held by the Supreme Court in *Harish Chandra Bajpai v. Triloki Singh* (1) the provisions of Chapter III of the Representation of the People Act, read as a whole, clearly show that the word "trial" is used as meaning the entire proceedings before the Tribunal from the time when the petition is transferred to it under section 86 until the pronouncement of the award. The pronouncement of the award would, of course, in most cases follow a complete hearing, including the recording of evidence tendered by both parties. In some cases, however, the award on an election petition may be pronounced without recording evidence because at an earlier stage it is found that the petition has no force and cannot succeed. The decision that after paras. 4 (a) to 4 (e) of the petition had been struck off, no cause of action was left which could be investigated by the court was a point relating to the merits of the petition and, having decided that the petition disclosed no cause of action, the Tribunal

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proceeded to dismiss the petition, which dismissal must be held to be a decision of the petition on merits.

The third angle from which this point can be examined is the effect of the provisions of the Code of Civil Procedure. Under sub-section (1) of section 90 of the Representation of the People Act, it has been laid down that "subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, (5 of 1908), to the trial of suits". An examination of the provisions of the Code of Civil Procedure would show that in cases where a plaint does not disclose any cause of action, the plaint can be rejected under Order VII, rule 11. If, therefore, it be held that the dismissal of the election petition by the Tribunal in the present case was not a decision on merits but a decision under the provisions of the Code of Civil Procedure, the order of 28th August, 1957 must be deemed to have been passed in pursuance of the provisions of Order VII, rule 11, Civil Procedure Code. The nature of such an order is indicated by the Code of Civil Procedure itself. Section 2 of the Code of Civil Procedure defines a decree. A decree under the Code of Civil Procedure means, "the formal expression of an adjudication, which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or 144". Thereafter, the definition proceeds to lay down certain exceptions which are not to be included within the definition of the word "decree". With these exceptions, we are not concerned. The order, which is now the subject matter of the appeal before us, is equivalent to an order rejecting a plaint under Order VII, rule 11, Civil Procedure Code, and the definition of the word "decree" indicates that such an order amounts to a decree. It is implied in the very nature of a decree that it is passed at the conclusion of a trial. It is the formal expression of an adjudication by the

court which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. In the present case, the matter in controversy was whether the election of respondent no. 1 should or should not be declared void. The order of 28th August, 1957, conclusively determined this question by dismissal of the petition. That order was, therefore, in the nature of an order dismissing a suit, which order of dismissal under the Code of Civil Procedure is treated as a decree. Consequently, even if the provisions of the Code of Civil Procedure are examined and the effect of the order of 28th August, 1957, is considered in the light of those provisions, it would appear that the order of 28th August, 1957, dismissing the election petition was an order made at the conclusion of the trial and consequently would be an order falling within the scope of section 98 of the Representation of the People Act.

The conclusion of a trial need not necessarily come after evidence of both parties has been recorded. A trial may be concluded after it has once commenced even without evidence being recorded. In some cases parties may tender no evidence at all and, after the pleadings and issues have been framed, it may be sufficient for the court to hear the parties and deliver judgment. In cases the judgment would be one passed at the conclusion of a trial. In the present case, the dismissal of the petition was certainly at a stage when evidence of parties had not been recorded but the trial had commenced and the trial was concluded by that order. Consequently, we hold that the order appealed against is an order under section 98 of the Representation of the People Act, so that his appeal is maintainable.

The appeal being maintainable, we have to consider how far the appeal can succeed on merits. In considering the merits of the appeal, one important point that has to be kept in view is that, under section 100 of the Representation of the People Act, an election can be declared void on the ground of the commission of a corrupt practice under two different circumstances. The first circumstance is when a corrupt practice has been

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committed by a returned candidate himself or by his election agent or by any other person with the consent of the returned candidate or his election agent. In such cases, it is enough for the election petitioner to establish that the corrupt practice had been committed. The other circumstance is when the corrupt practice has been committed in the interest of the returned candidate by a person other than the candidate or his election agent or a person acting with the consent of such a candidate or election agent. In such a case, section 100 of the Representation of the People Act requires that, in addition to the proof of the commission of the corrupt practice, the election petitioner must also allege and establish that the result of the election has been materially affected by the commission of that corrupt practice. In the present case, the allegations of corrupt practice contained in paras. 4 (a) to 4 (e) of the petition mention corrupt practices committed by the respondent no. 1 himself as well as corrupt practices committed by his agents and supporters. So far as the corrupt practices alleged to have been committed by the respondent no. 1 himself are concerned, his election can be declared void merely on proof of the commission of those corrupt practices. So far as the remaining corrupt practices alleged to have been committed by his agents and supporters are concerned, the appellant was required to allege and prove the further fact that the commission of those corrupt practices had materially affected the result of the election. None of the agents and supporters, who have been mentioned in these paragraphs, is alleged to have been the election agent of the respondent no. 1. Further, there is no allegation in paras. 4 (c) to 4 (e) of the petition that any of those agents or supporters committed the corrupt practices with the consent of the respondent no. 1 or his election agent. When no such allegations were made, it was necessary for the appellant, in order to ask for declaration that the election of the respondent no. 1, was void, to allege that the commission of the corrupt practices by the supporters and agents had materially affected the result of the election. No such allegation was made by the

appellant in those paragraphs or even subsequently when he moved the application for amendment of the petition. In these circumstances, in dealing with the appeal, all the allegations which have been made in paras 4 (c) to 4 (e) of the petition as well as the allegations which appear in the application for amendment moved by the appellant which relate to the commission of these corrupt practices by the agents and supporters of the respondent no. 1, must be ignored. All the pleadings regarding these corrupt practices become irrelevant because, in the absence of an allegation that these corrupt practices had materially affected the result of the election, they cannot be grounds for setting aside the election of the respondent no. 1. The result of this view expressed by us is that, in dealing with this appeal, we need examine the contents of paras. 4 (c) to 4 (e) only to the extent that they contain allegations of commission of corrupt practices by the respondent no. 1 alone.

Paragraph 4 (d) is the only paragraph where no act by the respondent himself is alleged. In that paragraph, the allegation is that the respondent no. 1 had sought the election as a candidate on behalf of the Praja Socialist Party and the further allegation is that the Praja Socialist Party committed corrupt practices for the furtherance of the prospects of election of the respondent no. 1 by directly and indirectly attempting to interfere with the free exercise of vote by making misrepresentation to the electors through posters, which misled the electors to believe that Mahatma Gandhi, the Father of the Nation, had enjoined the people on the dissolution of the Congress Organization and had enjoined the electors to vote for the candidate set up by the Praja Socialist Party. It is nowhere alleged that the respondent himself made any misrepresentation to the electors through posters pasted by him. This paragraph, therefore, has to be struck off altogether on the ground that it contains no allegation of commission of any corrupt practice by the candidate himself and, so far as the Praja Socialist Party is concerned, it has not been alleged that,

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even if it committed a corrupt practice, that practice materially affected the result of the election.

The first two charges of corrupt practice contained in paras. 4 (a) and 4 (b) can be dealt with together. In both of them, there were allegations that the respondent no. 1, his agents and other persons at the instance and with the approval of the respondent no. 1 had procured and hired on payment and otherwise Ekkas, Tongas and Rickshaws for the conveyance of the electors or had hired bullock-carts for the conveyance of electors to various polling stations. Both these paragraphs have been struck off by the Election Tribunal on the ground of vagueness. The application which was moved for amendment of these paragraphs was rejected. It was contended before us by the learned counsel for the appellant that the Election Tribunal went wrong in rejecting the application for amendment. In our opinion, in this appeal it is not necessary for us to go at all into the question whether that amendment application was rightly rejected or should have been allowed. Even on the basis that it has been wrongly rejected, it appears to us that the appellant cannot support these two paragraphs as being sufficiently precise and fulfilling the requirements of section 83 of the Representation of the People Act. By the amendment application, all that was sought was to give the names of the agents and other persons who, at the instance and with the approval of the respondent no. 1, had procured and hired the various conveyances. For the sake of examining how far these paragraphs satisfied the requirements of section 83 of the Representation of the People Act, we shall proceed on the assumption that the details about the names of the agents and supporters sought to be introduced by the amendment application had existed. It appears to us, however, that even after taking into account the names of those agents and supporters, these two paragraphs do not contain the full particulars which are required to be given under section 83 of the Representation of the People Act. It is to be noticed that under section 123 (5) of the Representation of the People Act, a corrupt practice consists in the act of hiring or

procuring certain types of vehicles by a candidate or his agent or by any other person for the conveyance of any elector to or from any polling station. A corrupt practice is, therefore, committed not by conveying the voter but by the act of hiring or procuring the conveyance. In clause (b) of section 83 (1), an election petitioner is required to set forth full particulars of the corrupt practice including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. The language used in this provision of law requires the setting forth of the full particulars of the corrupt practice and specially mentions at least three particulars, which must be given. These are the names of the parties alleged to have committed the corrupt practice, the date when the corrupt practice was committed, and the place of the commission of the corrupt practice. We have already indicated above that, in the case of the corrupt practice alleged in paras. 4 (a) and 4 (b) of the present petition, the commission of the corrupt practice was brought about by the act of hiring or procuring the conveyance. In the circumstances, the appellant was required to give the names of the parties who performed the act of hiring or procuring the conveyance, he was required to give the date of the commission of this act of hiring or procuring the conveyance, and he was required to give the place where this act of hiring or procuring the conveyance was committed. No attempt was made by the appellant to give the last two of these particulars in the petition or even in the amendment application. What was given was a description of the place to which the electors were conveyed by these conveyances. The mere conveying of the electors by hired or procured conveyance did not constitute corrupt practices. May be, it is an essential ingredient for an act to constitute a corrupt practice under clause (5) of section 123 of the Representation of the People Act to allege and prove the actual conveyance of the voters also, but that is a point on which we need not express any final opinion at this stage. Even if such a

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point has to be established by the petitioner, the principal charge which has to be alleged and proved by the petitioner is that the conveyance was actually hired or procured by the candidate or his agent or any other person. Since he has to allege the hiring or procuring of the conveyance, he must under section 83 (1) (b) give the particulars of the act of hiring or procuring and, when giving these particulars, in addition to other particulars that may be necessary, he must at least give the bare minimum indicated in that provision of law, viz., the names of the parties alleged to have committed such a corrupt practice, and the date and place of the commission of each such practice. In the present petition, the dates of hiring or procuring of conveyance which, according to paras. 4 (a) and 4 (b), were hired by the respondent no. 1, his agents or supporters have not been indicated at all. The places where they were hired or procured are also not mentioned. There are also no particulars to indicate what was the nature of each vehicle which was hired, as all of them have been described in the alternative without indicating at all which type of conveyance was hired by the candidate himself and which one by a particular agent or a particular supporter. Further, no details are given from which the particular vehicles, which were hired or procured, could be identified. It may have been sufficient for the petitioner either to give the registered numbers, if the vehicles were registered, or the licence numbers, if the vehicles were licensed, or to give the names of the owners of the vehicles. In any case, sufficient particulars should have been given which would have enabled the respondent to discover which particular vehicle he was charged with having hired or procured. All these details are missing. The result is that these corrupt practices are alleged in such vague terms that it is not possible for the respondent to meet the allegations made in these two paragraphs. The paragraphs further do not satisfy the requirements of section 83 (1) (b) of the Representation of the People Act. It has already been held by this Court that, to the trial of an election petition by an Election Tribunal, the provisions of Order VI, rule 16, Civil

Procedure Code apply. The Tribunal, in the circumstances indicated above, was fully justified in striking off the pleadings contained in paras. 4 (a) and 4 (b) of the petition.

There remains the question of paras. 4 (c) and 4 (e). We consider it convenient to deal with paragraph 4 (e) first. This paragraph, as put in the original petition, was extremely vague. All that was said in this paragraph was that the respondent no. 1, his agents and supporters, for the furtherance of the prospects of the election of the respondent no. 1, used national symbols such as the national flag in the constituency, which was prohibited by law. In this paragraph, it appears that in fact no particulars at all were given except one single particular relating to the identity of one of the persons who had committed the corrupt practice. That person was the respondent no. 1, himself. His agents and supporters were described by using these vague words without giving their names. The manner in which the national symbols had been used was not at all indicated. Even the actual national symbols, that were used, were not specified. The allegation was in a vague form that what had been used were "national symbols such as the National Flag". The place or places where the national symbols had been used were not given. In a very vague form it was mentioned that national symbols had been used in the constituency. There is no description at all of the place or places within the constituency where the corrupt practice of using the national symbols had been committed. So far as this election petition was concerned, the corrupt practice of using national symbols could only be relevant provided the national symbols had been used somewhere within the constituency. Instead of indicating the exact place or places where the act of using national symbols was done, what the petitioner did was to mention the whole constituency. The mere fact that the actual place of user was somewhere within the constituency would not mean that the way in which the place was indicated in this paragraph did amount to giving the particulars relating to the place of commission of the corrupt practice. Thus, in this paragraph, no particulars

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at all were given by the petitioner except, as we have said earlier, one specific particular relating to the identity of the respondent no. 1, himself as one of the user of the national symbols. Clearly, what the petitioner did was to reproduce a major part of the language used in subsection (3) of section 123 of the Representation of the People Act relating to this corrupt practice. In that provision of law, one of the corrupt practices is defined to be the use of, or appeal to, national symbols as the national flag or the national emblem. The national flag and the national emblem were mentioned as examples of national symbols. It is surprising that, in the petition where it was necessary for the petitioner to allege the exact national symbol which was used, because he had to base his petition on facts which had already come into existence before the petition was filed, he could not specify the particular national symbol used, but used the vague words "national symbols" and cited the example of the national flag as had been cited in the law itself. It seems that the petition had no definite information of facts on which he could base his ground. He made allegations in the vague language which was used in the law itself and then hoped that he would be permitted to enter into a roving inquiry where, from time to time, he could change his case and bring forward any charges under this head on which he could subsequently collect materials. Such a pleading is clearly contrary to the provisions of section 83 of the Representation of the People Act and, in our opinion, such defects cannot be removed by applying for an amendment under section 90 (5) of the Representation of the People Act. Under the latter provision of law, a Tribunal is empowered to allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition. It is to be noticed that this power granted to the Tribunal is confined to permitting an amendment or amplification. There can be an amendment or amplification of any particular only if the particular is first mentioned, but it is either not a full particular, or there has been some

omission or accidental error in mentioning the particular. In a case where no particular at all is given, it cannot be said that this provision would permit the particulars to be supplied subsequently at any stage when the petitioner might choose to move the Tribunal to exercise its powers under this provision of law. In the case of para. 4 (e), as we have indicated above, there were actually no particulars at all of the type required, either specifically or by necessary implication, under section 83 of the Representation of the People Act, and we do not think that section 90 (5) could cover the case of an amendment or amplification by supplying of the particulars, for the first time, by a subsequent application in such a case. Consequently, the Tribunal was right in rejecting the application for amendment in so far as it related to para. 4 (e) of the petition and in further striking off this paragraph under Order VI, rule 16, Civil Procedure Code, as containing pleadings that were much too vague.

Finally, we come to para. 4 (e) of the petition. In this paragraph the allegation was that there had been systematic appeals to the Mohammedan electors to vote and to refrain from voting on grounds of community and religion. It was alleged that these systematic appeal had been issued by the respondent no. 1 himself, his agent and other supporters, particularly Khwaja Khalil Ahmad Shah of Bahraich. The manner of making such appeal was said to be by holding *Milad* in five mosques on three different dates, 22nd, 23rd and 24th of February, 1957. It was further alleged that regular exhortations were made to the electors assembled in these mosques by the respondent no. 1, his agents and supporters after the *Milad* with the sole purpose of exciting the religious susceptibilities of the Mohammedan electors, with a view to influence them to cast their votes in favour of the respondent no. 1, on religious and communal grounds. In this paragraph, the corrupt practice is said to have been committed by the respondent no. 1, his agents and other supporters. So far as the commission of the corrupt practice by agents and other supporters is concerned, there is no allegation that they did so with the consent of

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the respondent no. 1 or his election agents. Further, there is no allegation at all that the corrupt practice committed by the agents and supporters of the respondent no. 1 had materially affected the result of the election. Consequently, in this paragraph also, so far as the allegation of the commission of corrupt practice by the agents and supporters of the respondent no. 1 is concerned, that allegation has to be ignored and must be struck off from the paragraph for the reasons which we have already indicated earlier in this order.

There then remains the allegation of systematic appeal having been made by the respondent no. 1. In the paragraph as it was originally put in the petition, the respondent no. 1 was described by this very description and that was quite sufficient for the purpose of the petition, as the full details of his identity were given at the beginning of the petition. The party, which was alleged to have committed the corrupt practice in the case of the respondent no. 1, was, therefore, described with full particulars. The dates when the corrupt practice was committed were also given in the paragraph by stating that these appeals had been made on the 22nd, 23rd and 24th of February, 1957. The appeals, according to this paragraph, had been made by a number of persons and in several mosques. There was an ambiguity in this paragraph as to which particular persons, charged with the corrupt practice, had committed the act of making an appeal, in which particular mosque and on which particular date. The appellant gave three dates together, without allocating to each date the appeals which were made in particular mosques mentioned in that paragraph. This is one of the defects which the appellant sought to rectify by his amendment application in respect of this paragraph. It appears to us that this prayer for amendment sought by the appellant was an appropriate prayer which could be put forward under section 90 (5) of the Representation of the People Act. He had already given the dates for the acts constituting the corrupt practice that had been committed but he had failed to specify separately the date of each separate act, which constituted the corrupt practice. By the amend-

ment application he has now clarified this position. According to Schedule III, sought to be added by the amendment application, the respondent no. 1 made an appeal in Jama Masjid, Bashirganj, on the 22nd of February, 1957, in Pir-ki-Imli ke Paswali Masjid, Nazirpura, on the 23rd of February, 1957, in Bambaiya Masjid, Bari Haat, on the 23rd of February, 1957, in Ghasiyari Masjid, Salarganj, on the 24th of February, 1957, and in Chaurahe ki Masjid, Chhawani, on the 22nd of February, 1957. It will thus appear that all the appeals by respondent no. 1 even after the specification were alleged to have been made on one or the other of the three dates, which had already been mentioned in the original para. 4(c) of the petition. This amendment was, therefore, only a clarification for the purpose of removing the ambiguity and making the particulars already given clearer. Such an alteration in the paragraph would, in our opinion, be an amendment or an amplification of the nature contemplated by section 90 (5) of the Representation of the People Act and this amendment should have been allowed by the Election Tribunal. Then a further amendment is sought by giving a more precise description of the mosques in which the respondent no. 1 made these appeals. In the original petition, the mosques were indicated by merely mentioning the mohallas in which they were situated. It appears that the appellant thought that his giving the names of the mohallas, in which the mosques were situated, would be sufficient to enable the respondent to identify the particular mosques to which he was referring. When an objection was taken in the written statement on this point, a contention was put forward on behalf of the appellant that sufficient particulars had been given, but later, when the appellant felt that the Tribunal was not inclined to accept his submission that the particulars were sufficient, he applied for amendment in order to give more detailed particulars in this respect. Again it seems that the appellant did try to give the particulars relating to the situation of the mosques but they were a little vague and incomplete. Consequently, by the amendment application, he sought

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to specify each mosque by giving a more detailed description of it. The mohallas given are the same as were indicated in the original petition, but a further description of each mosque is given so that, if there be more than one mosque in that mohalla, the particular mosque, which was used, could be easily identified. This is clearly an amplification of a particular, which was already given in the original petition. Such an amplification should have been permitted under section 90 (5) of the Representation of the People Act.

For opposing the amendment application, a further contention was put forward by learned counsel that this application for amendment was made at a very late stage, and, at such a stage there would be no justification for allowing any amendment. We firstly take note of the fact that the Election Tribunal, in dismissing the amendment application, did not come to the view that the stage was so late that it would be inappropriate to allow an amendment application and the application was dismissed on an entirely different ground. Further, in the circumstances of the present case, we are of the opinion that the delay was not such as to disentitle the appellant from seeking this amendment. As we have indicated above, he had already given the dates when the appeals were said to have been made by the respondent no. 1, his agents and his supporters, and he had already given the description of the mosques which he thought would be sufficient. In the circumstances, it was not unnatural if, at the time of arguments, before the Election Tribunal, he sought to justify his position and submitted that sufficient particulars had already been supplied. When, at the conclusion of arguments, he discovered that his submission was not going to be accepted, or possibly when in the arguments he got an indication of what particulars were missing, he moved this amendment application amplifying the particulars already given. We do not think that, in these circumstances, there would have been any justification for refusing this application for amendment.

In addition to this ground, learned counsel for the respondents has urged one other ground before us for

justifying the order passed by the Election Tribunal striking off para. 4 (c) of this petition. According to learned counsel, it was not sufficient in this paragraph for the appellant to say that systematic appeals had been made to the Mohammedan electors to vote and to refrain from voting on grounds of community and religion, nor was it sufficient to say that regular exhortations were made to the electors assembled in the mosques with the sole purpose of exciting the religious susceptibilities of the Mohammedan electors with a view to influence them to cast their votes in favour of the respondent no. 1 on religious and communal grounds. The contention of learned counsel is that, if the appellant wanted to rely on the corrupt practice of making systematic appeals to the Mohammedan electors to vote and to refrain from voting on grounds of community with the sole purpose of exciting their religious susceptibilities, the appellant should have given in his pleading the exact words which had been used by the respondent no. 1 when making such appeals. It is no doubt correct that, if the actual words could have been reproduced, it would have been more helpful to the respondent for the purpose of meeting the charge brought against him ; but we are unable to accept the contention that, under section 83 of the Representation of the People Act, it was mandatory for the appellant to reproduce the exact words. The language, which has been used in para. 4(c), gives a very clear indication of the nature of the appeals that were made. There is a mention that the appeals were made in the evenings after holding *Milad* and that the appeals were addressed to the Mohammedan electors who were present. There is the allegation that the electors should vote or refrain from voting on grounds of community and religion. There is the allegation that there were regular exhortations to the electors to cast their votes in favour of the respondent no. 1 and that these exhortations were made with sole purpose of exciting the religious susceptibilities of the Mohammedan electors who were present. It seems to us that these details given are quite sufficient to indicate the nature of the appeals that were made and there was no necessity to reproduce the actual words which were used in the appeals. The exact words may have to be proved during the trial of the petition but that

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is another matter on which we refrain from expressing any opinion at this stage. So far as the pleadings in the petition are concerned, the facts which have been stated in the paragraph appear to us to be sufficient to satisfy the requirements of section 83 of the Representation of the People Act.

As a result of our above decisions, the order of the Tribunal striking off paras. 4 (a), 4 (b), 4 (d) and 4 (e) of the petition is maintained and to that extent the appeal fails. The order of the Tribunal striking off para. 4 (c) of the petition is set aside but the portions in that paragraph relating to appeals made by persons other than the respondent no. 1 shall be ignored. For the purpose of the trial of the petition, para. 4 (c) shall be read as containing only the allegation of commission of corrupt practice by the respondent no. 1 alone, including particulars supplied in the amendment application. With these directions, we set aside the order of the Election Tribunal dismissing the petition and remand the petition for a fresh trial to the Election Tribunal.

Costs of this appeal will abide the result of the petition but, whenever a direction is made for the payment of costs to one party, or the other, the amount of costs of this appeal shall be deemed to be a sum of Rs.250

Case remanded.

APPELLATE CIVIL

*Before the Honourable O. H. Mootham, Chief Justice,
 and Mr. Justice Srivastava*

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U. P. Agricultural Income Tax Act, 1949, ss. 22, 25—*Limitation to re-assess expired—State, if to get re-assessment under revisional powers—Constitution of India, 1950, Art. 226.*

It is not open to the State to circumvent all the provisions of s.25 of the Agricultural Income Tax Act by making a belated

application under s.22 of the Act to the revising authority and attempting in that way to have the income of the assessee reassessed after the period of limitation of one year fixed for that purpose has expired.

Case-law discussed.

Special Appeal No. 88 of 1956, (connected with Special Appeals Nos. 89, 90, 91 and 92 of 1956), from a decision of Chaturvedi, J., dated 21st December, 1955, in Civil Misc. Writ No. 737 of 1955.

The facts appear in the judgment.

S. S. Dhavan for the applicant appellants.

The judgment of the Court was delivered by—

SRIVASTAVA, J.:—This special appeal has been preferred against an order of Mr. Justice CHATURVEDI, by which he rejected a petition filed by the appellant under Article 226 of the Constitution. Four other petitions had been filed by the appellant with similar prayers. All the five petitions were disposed of by a common judgment, as the questions of law which they sought to raise were identical.

The appellant is a firm which carries on business of supplying seeds and plants at Saharanpur. The appellant was assessed to agricultural income-tax under the U. P. Agricultural Income Tax Act, 1949. It was not found assessable for the year 1947-48, but was assessed for the years 1948-49, 1949-50, 1950-51, 1951-52 and 1952-53 on 25th October, 1949, 26th September, 1950, 25th September, 1951, 12th September, 1952 and 6th April, 1954, respectively. The appellant acquiesced to the assessments in respect of the other years but filed an appeal before the Commissioner, Agricultural Income-tax, in respect of the assessment for the year 1951-52. In that appeal the Commissioner enhanced the assessable income of the appellant. The appellant then filed an application in revision against the appellate decision of the Commissioner before the Revision Board. While this revision application was pending, in June, 1955, the State filed six applications in revision before the Revision Board in respect of the assessments of the six years, viz. 1947-48, 1948-49, 1949-50, 1950-51, 1951-52 and 1952-53. Notices in respect of these

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revision applications by the State were served on the appellant. It had no objection to the maintainability of the revision petition filed in respect of the assessment for the year 1951-52 as its own revision application was also pending before the Board of Revision in respect of that year. It, however, filed five petitions under Article 226 of the Constitution praying for a suitable order or direction, including a writ in the nature of prohibition, calling for the record of the revision applications filed by the State and quashing the proceedings. It also wanted the State to be directed to forbear from proceeding with the revision applications.

It argued that under section 25 of the Agricultural Income Tax Act a limitation of one year was fixed for re-opening assessments, which had been finalized, and, for assessing or re-assessing escaped incomes, section 22 of the Act, which conferred powers of revision on Revision Board, was, it contended, subject to the provisions of section 25 of the Act. It was, therefore, urged that the Revision Board had no jurisdiction in the exercise of its revisional powers at the instance of the State to consider the question of re-opening the already completed assessments for the years 1947-48, 1948-49, 1949-50, 1950-51 and 1952-53 thus to contravene the express provisions of section 25 of the Act.

A preliminary objection against the petitions was raised on behalf of the State and it was urged that the revision applications having already been filed before the Revision Board, it was within the jurisdiction of that authority to hear and decide them. The objection raised in the petitions, it was contended, could be urged before the Revision Board itself and, if was found tenable, it would be given effect to by that Board. No writ of prohibition, it was pointed out, could be issued directing the Board not to proceed with the hearing of the revision applications.

The preliminary objection found favour with the learned Judge and he rejected the petitions. In his order, however, he remarked that there was a decision of

the Patna High Court reported in *Province of Bihar v. Khetra Mohan Kumar* (1), which appeared to support the appellant's contention but observed that it was open to the petitioner to rely on that authority before the Revision Board.

Appeals were filed against the dismissal of all the five petitions and during the pendency of the appeals the Revision Board took up the applications in revision filed by the State for disposal along with the application for revision which the appellant had himself filed in respect of the assessment year 1951-52. The decision of the Patna High Court was brought to the notice of the Revision Board but was not followed by it. The Board took the view that the matter had come to it in the ordinary course and the question it was considering was the correctness or otherwise of the assessments made under section 16 of the Act. The Board was also of opinion that the proceedings before it could not be governed by the restrictions provided in section 25. Holding that the assessment orders had not been properly made in respect of the years 1355 to 1358 Fasli and 1360 Fasli, the assessment of those years were set aside and the cases were sent back to the assessing authority for fresh assessments in respect of those years. The revision filed by the State in respect of the year 1359 Fasli was dismissed. The revision of the appellant in respect of the year 1951-52 was also dismissed. These orders were passed by the Board on the 31st October, 1956.

After this decision of the Revision Board, the appellant obtained leave from this Court for the amendment of his memorandum of appeal in all the five cases. By this amendment the prayer made in the petition was altered and a suitable order or direction including the writ of certiorari was prayed for quashing the order of the Board of Revision passed in the revision applications. A writ of mandamus was also prayed for directing the State to forbear from taking any other proceedings against the appellant with a view to imposing any assessment in respect of the agricultural income-tax for the

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years in question. Permission was also granted to amend the prayers in the petitions themselves but the prayers were not actually amended.

The main contention pressed in appeal is that the revisional powers of the Board of Revision under section 22 of the Agricultural Income Tax Act are subject to the provisions of section 25 of the Act, and, after the expiry of the period of limitation mentioned in the latter section, it was not open to the Board of Revision, in the exercise of its revisional powers, to order re-assessment in the manner in which the Board had directed by its order dated the 31st October, 1956. It was, therefore, contended that the order of the Board of Revision was liable to be quashed. Reliance in support of the contention was again placed on the Patna case of *Province of Bihar v. Khetra Mohan Kumar* (1).

The reply of the learned counsel for the respondent is two-fold. He urges in the first place that the applications made by the State before the Revision Board only had the effect of continuing before that body the question of proper assessment in respect of the various years which had been made under section 16 of the Act. If the assessments had not been properly made, it was open to the State to move the Revision Board to direct that they be properly made. It was, therefore, not a question of re-opening any assessment or of assessing any escaped income and section 25 of the Act did not apply at all. The alternative contention is that really there is no inconsistency between sections 22 and 25 of the Act. The provisions of section 25 only prohibit the assessing authorities from pursuing a particular course of action after the expiry of the fixed period. The Board of Revision is not an assessing authority and is, therefore, unaffected by the provisions of section 25. The Board in its revisional powers may issue any instructions. The grievance of the appellant will arise only if in following those directions the assessing authorities contravene the provisions of section 25 of the Act. This contravention can be challenged by the assessee in appeal and again in

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revision. If the assessee is not able to get adequate relief in those proceedings it is open to him to question the order under Article 226 of the Constitution. The appellant was, therefore, not entitled to a writ of prohibition directing the Board not to hear the applications in revision and now that the applications have been heard, it is not entitled to have the decision quashed by a writ of certiorari.

The scheme of the U. P. Agricultural Income Tax Act, 1948, shows that "assessing authorities" are enumerated in section 14. The Board of Revision is not one of them. Return of income is made under section 15 and assessment is made under section 16. If the assessee is dissatisfied with the assessment, he can appeal to the Commissioner of Agricultural Income-tax under section 21. In section 23 the order passed under section 21 is described as a final order and is to be communicated to the assessee as well as to the prescribed authority. Section 22 of the Act then provides :

"REVISION BY BOARD—(1) The Revision Board may, on their own motion or on an application, call for the record of any proceeding under this Act pending before or decided by any authority subordinate to the Revision Board and after such inquiry as they deem necessary, may pass such orders as they think fit:

Provided that the Revision Board shall not pass any order prejudicial to an assessee without giving him a reasonable opportunity of being heard.

(2) Any order passed by the Revision Board under sub-section (1) shall, subject to any reference that may be made to the High Court under section 24, be final."

Section 24 provides for a reference to the High Court and Section 25 deals with income escaping assessment. It lays down :

"If for any reason any agricultural income chargeable to agricultural income-tax has escaped

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assessment for any year or has been assessed at too low a rate, the assessing authority may at any time within two years of the expiry of that year, serve on the person liable to pay agricultural income-tax on such agricultural income or, in the case of a company on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (3) and 3-B of section 15 and may upon service of such notice proceed to assess or re-assess such income, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged if such income had not escaped assessment or full assessment, as the case may be."

Section 26 relates to rectification of mistakes.

It will be noticed that though periods of limitations are provided for in sections 21, 24, 25, and 26, no period of limitation is provided for the exercise of the revisional powers of the Board under section 22. Under section 23 the orders passed under section 22 are also to be considered final orders and communicated to the assessee and the prescribed authority.

An analysis of section 25 of the Act makes the following features clear :

- (1) It confers powers of assessment or re-assessment only on the assessing authorities. As has already been mentioned, assessing authorities are enumerated in section 14 and the Revision Board is not one of them.
- (2) The powers conferred by this section can be exercised only in two contingencies, namely, if for any reason some agricultural income has escaped assessment, or, if it has been assessed at too low a rate.

- (3) If the assessing authority wants to exercise the powers conferred by this section, it must take action before the expiry of two years from the last date of the year for which same income has escaped assessment or has been assessed at too low a rate. The period of two years is to be counted from the last date of the year in question and not from any other date. If this period of two years has on any account expired, no action can be taken under section 25.
- (4) Action under section 25 is to be initiated by service on the person liable to pay the tax of a notice complying with the requirements of sub-section (3) and (3-B) of section 15.
- (5) After a service of the notice it will become open to the assessing authority either to assess an income which has escaped altogether or to re-assess the income by applying a higher rate.
- (6) In case assessment or re-assessment is made under section 25, all the provisions of the Act, including provisions relating to appeal and revision, shall be applicable as if the assessment was being made on the basis of a return under section 15.
- (7) The rate at which the tax will be charged in assessment or re-assessment under section 25 shall be the rate which would have been chargeable if the assessment had been made in the ordinary manner.

The expression "income which has escaped assessment" has not been defined in the Act but appears to have been borrowed from section 34 of the Indian Income Tax Act. In that connection it has been held that the expression is not confined to cases where the income has eluded notice, . . . or is not included in the return but covers those items of income also which though shown in the return are not assessed for some

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reason or the other ; see *Madan Mohan Lal v. Commissioner of Income-tax, Punjab and N. W. F. P.* (1) and *Nawal Kishore Kharaiti Lal v. Commissioner of Income-tax, Punjab and N. W. F. P.* (2). In a Rangoon case reported in *Commissioner of Income-tax, v. Ved Nath Singh* (3), a Special Bench of that Court held that "an income was to be taken to have escaped assessment within the meaning of section 34 of the Income Tax Act, when it has not been assessed in the assessment year under consideration. The omission to assess the income may be due to a variety of reasons. It may not have been disclosed by the assessee in his return, the assessing authority may have omitted to notice it, an unjustified exemption allowance may have been allowed, wrong calculations may have been made, or an incorrect rate may have been applied. In all these contingencies the result will be that the total tax chargeable will not be levied and the whole or a portion of the income will escape assessment. In our opinion the phrase "income which has escaped assessment" has the same meaning when used in the Agricultural Income Tax Act.

Section 25 thus clearly provides that it is not open to the assessing authorities after the period of the limitation mentioned in the section to assess or re-assess any income which ought to have been assessed earlier. If the assessing authority is definitely prohibited from making such an assessment or re-assessment, it can hardly claim to be entitled to do so under the directions of the Revision Board. It is obvious that the Revision Board cannot authorize the assessing authority to do something which under the law that authority is not entitled to do.

Learned counsel for the respondent pointed out in this connexion that, unlike section 33 of the Income Tax Act, section 22 of the Agricultural Income Tax Act does not contain the word, "subject to the provisions of this Act". On that basis he argued that the revisional powers of the Board of Revision could not be subject to the provisions of section 25. It is difficult to accede to this

(1) A. I. R. 1935 Lah. 742.

(2) A. I. R. 1936 Lah. 897.

(3) A. I. R. 1940. Rang. 65.

contention. It cannot be said that the powers of the Commissioner under section 33 of the Income Tax Act would not be subject to the other provisions of the Act, if those words had not been there in the section. The words appear to have been put in there only as a matter of abundant caution. The terms of section 22 of the Agricultural Income Tax Act are certainly wide as the Revision Board can pass any orders which it considers fit. But can it be said on that account that in passing such orders the Revision Board can ignore, or can set at naught the provisions of the Act? Can it impose a tax on a person whose income falls below the minimum provided? Can it direct that a rate be applied in contravention of the rate mentioned in the schedule of the Act? The Board cannot obviously direct the assessing authorities to do what the Act does not authorize them to do. In that sense section 22 is clearly subject to the other provisions of the Act, including section 25.

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In the present case the Board of Revision has entertained the applications in revision filed before it by the State. There can be no doubt that the applications were made after a very great delay. There is, however, no limit provided in the Act for making applications in revision to the Revision Board. It cannot, therefore, be said that the applications should have been rejected as time-barred. The Board was, therefore, entitled to entertain those applications. It had jurisdiction to deal with them and to decide them. No writ of prohibition could, therefore, be issued preventing the Board either from entertaining the applications or from dealing with them. We think therefore, with respect, that the view taken by CHATURVEDI, J., in this connexion was right.

The Revision Board has now decided the applications in revision, and finding that in respect of five of the six years in dispute the assessment had not been properly made, it has sent the cases relating to those years back to the assessing authorities for making the assessments according to law. In respect of this order too it cannot be said that the Board has exceeded its jurisdiction in any

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manner. If it could consider and entertain the applications in revision, it could while deciding them remand the cases for reconsideration by the assessing authorities.

The Board has not directed the assessing authority to contravene the provisions of section 25 of the Act, nor has it authorized the authority in any manner to act contrary to what has been laid down in that section. The order of the Revision Board is, therefore, not open to challenge on the ground of want of jurisdiction or any error of law apparent on the face of the record. No question of quashing it by a writ of certiorari arises in the circumstances.

Learned counsel for the appellant, however, contended that his client apprehended that on the basis of the directions issued to by the Revision Board, the assessing authority may proceed to enhance the tax assessed on the appellant in respect of the five years in question, and, if that is done, it will amount to a clear breach of the provisions of section 25. We are not satisfied that this apprehension of the appellant has any legal basis. There is no reason to suppose that when the assessing authority begins to reconsider the matter as a result of the remand it will go out of his way to make an assessment or reassessment which is prohibited by section 25. If, however, it does so, it will be open to the appellant to question the order in appeal and then, if necessary, to go up in revision to the revising authority. If even that does not serve the purpose, it may be open to the appellant to challenge the illegal order by the writ petition. Until, however, the assessing authority passes an order contravening the provisions of section 25, the appellant cannot claim to have any grievance.

It was contended on behalf of the respondent that the applications in revision filed before the Revision Board only amounted to a continuation of the assessments which had been made by the assessing authority in respect of the various years. That being so, it is urged the actual effect of the orders of the Revision Board is that the assessment, should be reconsidered and made on a correct basis. As long as the assessment was

continuing, no income could have been said to have escaped assessment and there could be no question of contravening the provisions of section 25. Reliance is placed in this connexion on the case of *Sir Rajendra Nath Mukerji v. The Commissioner of Income-tax* (1). This contention does not appear to be well-founded. The assessments for the years 1947-48, 1948-49, 1949-50, 1950-51 and 1952-53 were certainly subject to modification in appeal, but when no appeals were filed against them either by the State or by the assessee, they became final. They cannot be held to have lost their finality simply because there was a chance of their being questioned in revision at a late date. The orders having become final, the assessments cannot be said to have been continuing. The filing of the applications in revision could not extend the continuance of the assessments. As was observed by the *Privy Council in The Commissioner of Income-tax, Bombay Presidency and Aden v. Messrs. Khemchand Ramdas* (2) :

"It had been argued on behalf of the appellant that the Act nowhere imposes any limit of time within which an assessment under the provisions of sections 23 and 29 is to be made, and that the service of the notice of demand can, therefore, be made at any time. This is true. It had, in effect, been so determined by this Board in 61 I. A. 10. But it is not true that after a final assessment under those sections has been made, the Income-tax Officer can go on making fresh computations and issuing fresh notices of demand to the end of all time. It is possible that the final assessment may not be made until some years after the close of the fiscal year. Questions of difficulty may arise and cause considerable delay. Proceedings may be taken by way of appeal and cause further delay. Until all such questions are determined and all such proceedings have come

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(1) A. I. R. 1934 P. C. 30.

(2) A. I. R. 1938 P. C. 175.

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to an end there can be no final assessment. But when once a final assessment is arrived at, it cannot, in their Lordships' opinion, be reopened except in the circumstances detailed in sections 34 and 35 of the Act (to which reference is made hereafter) and within the time limited by those sections."

It is, therefore, not correct that it was open to the State to circumvent all the provisions of section 25 of the Agricultural Income Tax Act by making a belated petition to the revising authority and attempting in that way to have the income of the appellant reassessed after the period of limitation fixed for that purpose has expired.

In view of what has been said above, it appears to us that the appellant is not at present entitled to any of the reliefs which it has claimed. The appeal is, therefore, dismissed. In the circumstances of the case, however, we think it will be fair if the parties are left to bear their own costs. We order accordingly.

Appeal dismissed.

CIVIL REVISION

*Before Mr. Justice V. D. Bhargava**

RAM KRISHNA GUPTA (APPLICANT)

1958

January, 23

v.

HARI KRISHNA TANDON (OPPOSITE PARTY)

Landlord and Tenant—Garage gate, construction of—Soak-pit, construction of—United Provinces (Temporary) Control of Rent and Eviction Act, 1947, s. 7 (E), scope of.

Held, where the garage had no gate, fixing a gate would not be keeping the garage or maintaining it in the condition in which it was let out to the tenant by the landlord. It would be adding something new to it.

Held, further, that unless it can be specifically proved that there was contract or a custom by which the landlord was bound to repair the soak-pit, he has no liability under the law to repair it.

*Sitting at Lucknow.

Civil Revision No. 91 of 1955 from an order of B. K. Mathur, Munsif, South, Lucknow, dated 22nd January, 1955.

The facts appear in the judgment.

G. N. Srivastava for applicant.

M. K. Seth for opposite party.

BHARGAVA, J. :—This is an application under section 115 of the Code of Civil Procedure against an order under section 7-E of the United Provinces Control of Rent and Eviction Act.

The tenant filed an application that there were certain repairs needed in the house which the defendant-landlord had not made. The defence was that there was no liability on the plaintiff to do all these repairs, nor was there any agreement or custom by virtue of which he was bound to make these repairs. The learned Munsif came to the conclusion that since the defendant had made repairs once or twice, he was bound to make the repairs. In the repairs that he had ordered are—fitting a gate to the garage, repairs of the soak-pit and flush latrine, fixing of glass-panes in all the doors and windows and repairing of the roofs of the kitchen and the godown which were leaking.

So far as the gate is concerned, it was not the case of the plaintiff that there were gates fixed to the garage which were broken but he wanted new gates to be fixed. A reading of section 7-E makes it quite clear that it is not incumbent upon the landlord to make any new constructions or additions. He is, under section 7-E of the Act, "bound to keep the accommodation in the occupation of a tenant wind-proof and water-proof and to carry out other repairs which he is bound to make by law, contract or custom". The word used is "keep". The relevant meaning, which will be applicable to the facts of the present case, according to Oxford English Dictionary, is "to take care, to maintain in proper order and to preserve in being or operation". Thus the meaning of the words "to keep" appears to me to be that he will maintain it in the condition in which it was originally

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let out to him. If a person takes a house without doors or verandah on rent, he cannot later on ask the landlord to fix doors and windows or to make a construction all round the verandah so that the verandah may become wind-proof. Here, the garage had no gate and, therefore, fixing a gate would not be keeping the garage or maintaining it in the condition in which it was let out. It would be adding something new to it.

The words further used in the section are that the landlord shall be bound . . . "to carry out *other repairs*". It means that "keeping an accommodation in the occupation of the tenant, wind-proof or water-proof", is also a kind of repair, otherwise there was no sense in using the words "other repairs". First portion of the section means that they are one kind of repairs, while there are different kinds of repairs under the second portion. The difference between the two is that in the first case it is obligatory on the landlord, but in the case of the other, the liability can only be enforced if it had been under some law, custom or contract. In the circumstances I think that there was no liability on the landlord to fix a gate, and that portion of the order of the learned Munsif was without jurisdiction.

The other repair, which has been ordered, is about the soak-pit. That again will not come under the first portion of the repairs. Repairing the pit will not make it wind-proof or water-proof. Unless it can be specifically proved that there was a contract or a custom by which the landlord was bound to repair the soak-pit, he has no liability under the law to repair it.

As regards the repairing of the roofs of the kitchen and the godown, which are leaking, I think it was the duty of the landlord to repair. As regards the fixing of glass panes in all the doors and windows, it has been urged that the doors and windows had no glass-panes even at the time when the tenancy started. The doors and windows had once upon a time glass-panes and the rooms cannot be kept wind-proof and water-proof without there being glass-panes. So far as the fixing of glass-panes or window-panes is concerned, I think the

court was justified in passing the order. Therefore, I modify and set aside the order of the learned Munsif so far as the repairs of the garage and soak-pit are concerned, but maintain his order as regards the glass-panes, roofs of the kitchen and the godown and *jali* doors in the kitchen.

With the above modification, the revision is thus partly allowed, but, in the circumstances of the case, I make no order as to costs.

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Revision partly allowed.

APPELLATE CIVIL

*Before Mr. Justice Singh**

BALJIT SINGH AND ANOTHER (APPELLANTS)

v.

MUNNU LAL AND OTHERS (RESPONDENTS)

1958

February, 13

Mortgagor and Mortgagee—Suit for recovery of money and foreclosure on the basis of mortgage—Preliminary decree passed—Application for final decree—Service on the judgment-debtor, if essential—Civil Procedure Code, 1908, Order XXXIV, rule 3 (before and after amendment in 1829), scope of. Civil Procedure Code, 1908, Order IX, rule 13, scope of.

A suit for recovery of money and for foreclosure was filed on the basis of a mortgage deed, dated the 3rd September, 1948, executed by the two defendants. A preliminary decree was passed with the consent of the two defendants on the 3rd September, 1949, with six months time for payment. An application for final decree for foreclosure was made on 18th July, 1950, and notice was served on one of the defendants but no notice was served on the other defendants.

Held that prior to the amendment in 1929 of Order XXXIV, rule 3, Civil Procedure Code, no notice was necessary to be served on the judgment-debtors as it would not make any difference if the judgment-debtors were informed that they had not made the payment when the judgment-debtors knew whether they had or had not made the payment before the date fixed for payment. But after the amendment in Order

*Sitting at Lucknow.

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XXXIV, rule 3, in 1929, a notice should be issued to the judgment-debtors so that they could know that there is an application for a final decree and might exercise their right of paying up the decretal amount before the final decree is passed.

Tikaram Namaji v. Tarachand Gujoba (1), *Braja Kishore De v. Gour Chandra Ray* (2) and *Mahadeo Agarwala v. Joy Narayan Sanehiram Firm* (3) relied on.

Held, also that Order IX, rule 13 provided for the setting aside of a decree against those defendants also did not make an applicaiton for the setting aside of the decree, if it appears that the decree is one and indivisible and cannot be set aside against one particular defendant.

First Appeal From Order, no. 59 of 1951, from an order of A. P. Bhatnagar, Civil Judge, Hardoi, dated 1st December, 1951.

The facts appear in the judgment.

M. M. Lal for appellants.

R. N. Shukla for respondents.

SINGH, J.:—This is an appeal from an order of remand passed by the Civil Judge, Hardoi. It appears that a suit for recovery of money and for foreclosure was instituted against two persons Nathu Lal and Munnu Lal on the basis of a mortgage deed, dated the 23rd of September, 1948—executed by both of them. A preliminary decree was passed with the consent of the defendants on the 7th of December, 1949, with six months' time for payment. An application for the passing of a final decree for foreclosure was then made on the 8th July, 1950, and notices were issued to the two judgment-debtors Nathu Lal and Munnu Lal. Nathu Lal was served personally but the summons for Munnu Lal was presumably taken by Nathu Lal. Nobody turned up on the date of the hearing and a final decree for foreclosure was passed on the 2nd of September, 1950.

Munnu Lal made an application on the 31st October, 1950, for the setting aside of the final decree on the ground that he had no notice of the passing of the final

(1.) A. I. R. 1954 Nag. 135. (2.) I. L. R. [1946] 1 Cal. 333.

(3.) I. L. R. [1949], 1 Cal. 113.

decree which was *ex parte* against him. This application made by Munnu Lal was, however, dismissed by the learned Munsif of Hardoi on the ground that Munnu Lal and Nathu Lal had lost their interest in the property on account of the sale-deed executed by them on 25th October, 1950, and as such they had no right to maintain the application under Order IX, rule 13, Civil Procedure Code. The learned Munsif also held that a notice of an application for a final decree was not necessary. Munnu Lal then went up in appeal and the appellate court came to the conclusion that a notice was necessary, and as the question as to whether a notice was served on Munnu Lal or not, or whether he had knowledge of the application for the passing of a final decree had not been decided by the learned Munsif, he ordered the case to go back to the Munsif for a finding on that point. Baljit Singh and Hanuman Prasad have now come up in appeal against this order of remand.

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The only point which arises for determination in this appeal is whether a notice of an application for the passing of a final decree for foreclosure was necessary. There is no express provision in Order XXXIV, rule 3, Civil Procedure Code, for the issue of a notice to the defendant, and, it has been urged that no notice was therefore, necessary in this case. The view taken by the various High Courts in their pronouncements is not uniform but before the reported cases on this point are examined, it is necessary to indicate the change made in the wording of Order XXXIV, rule 3, Civil Procedure Code, in 1929. Before the amendment, which was made by the Transfer of Property (Amendment) Supplementary Act, 1929, the relevant part of Order XXXIV, rule 3, stood as follows :

"Where such payment is not so made, the court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property."

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and also, if necessary, ordering the defendant to put the plaintiff in possession of the property :

“Provided that the court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payments.”

Order XXXIV, rule 3, stood as follows after the amendment in 1929 :

“Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into court of all amounts due from him under sub-rule (1) of rule 2, the court shall, on application made by the defendant in this behalf, pass a final decree.”

It would appear from the wording of Order XXXIV, rule 3, as it stood before the amendment made in 1929, that a judgment-debtor was not entitled to pay the decretal amount after the expiry of the period granted for the payment. No doubt he had a right to apply for enlargement of time, but in either case he knew the date by which he had to make the payment in order to save his property. The view taken by the courts, before this amendment, was that no notice was necessary, as it would not make any difference if the judgment-debtor was informed that he had not made the payment when the judgment-debtor knew whether he had or had not made the payment before the date fixed for the payment.

After the amendment made in Order XXXIV, rule 3 in 1929, the judgment-debtor was not stopped from paying the decretal amount and saving his property till the final decree was passed, even though the time originally granted for payment of the money had expired. This change is significant inasmuch as the judgment-debtor's right to save the property by paying up the decretal amount was not lost till the final decree was actually passed and he could, even though he had not

made payment in proper time, pay up the decretal amount before the actual passing of the final decree and a notice would, therefore, be necessary.

The learned counsel for the appellants has cited *Surendra Kumar Singh v. Mukund Lal Sahu* (1). It is a Single Judge case and reliance has been placed in this case on an earlier unreported decision of that Court. No grounds have been given for holding that a notice was not necessary and the learned Judge who decided the case felt bound by the earlier decision. The earlier decision is unreported and the reasons for the decision are not available.

Reliance has also been placed on the two cases of this Court in *Mahadeo Pandey v. Somnath Pandey* (2) and *Mst. Fahiman v. Awadh Behari Lal* (3). Both of these cases were decided before the amendment of 1929 and it is, therefore, not necessary to refer to these cases.

The learned counsel for the respondents has, on the other hand, cited three recent cases in which the point as to whether a notice was necessary has been considered. In *Tikaram Namaji v. Tarachand Gujoha* (4), which is a Division Bench case, it was held that although there was no specific provision in the Code of Civil Procedure for issue of notice to the defendants of an application for making a preliminary decree final, a notice was necessary. Reference was also made in this reported case to various other provisions of the Code of Civil Procedure in which, no provision for issue of a notice has been made, yet notices have to be issued. The absence of a specific provision for the issue of a notice does not, therefore, indicate that no notice was necessary. If the matters are such that a notice to the other party should be given a notice should be deemed to be necessary.

There are two cases of the Calcutta High Court also which are Bench cases in *Braja Kishore De v. Gour Chandra Ray* (5) and *Mahadeo Agarwalla v. Joy Narayan Sanehiram Firm* (6). In both of these cases it has been

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(1) A. I. R. 1949 Pat. 68.

(2) A. I. R. 1926 All. 757.

(3) A. I. R. 1929 All. 279.

(4) A. I. R. 1954 Nag. 135.

(5) I. L. R. [1956] (1) Cal-1; 333.

(6) I. L. R. [1949] 1, Cal. 113.

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held that an application under Order IX, rule 13 may be made when an *ex parte* final decree for sale or foreclosure is passed. It has also been held that although there is no specific provision for giving a notice to the defendant of an application for the passing of a final decree for sale, it is just and proper that such notice should be given. It would thus appear that, although no specific provision for the issue of a notice has been made in the Code of Civil Procedure under Order XXXIV, rule 3 a notice should be issued to the judgment-debtors so that they could know that there was an application for final decree and might exercise their right of paying up the decretal amount before the final decree is passed. I agree, if I may say so with respect, with the views of the Calcutta and Nagpur High Courts referred to above and am of opinion that a notice was necessary. The view taken by the lower appellate court on this point appears, therefore, to be correct.

Another point pressed on behalf of the appellants was that the respondents Munnu Lal and also Nathu Lal had sold the property to one Sadanand on the 25th October, 1950, and as such they had lost their right to maintain an application for the setting aside of the *ex parte* decree. The final decree in this case was passed on the 2nd September, 1950, and if this was a good decree, the foreclosure became final and the judgment-debtors had lost all rights in the property; they could not, therefore, transfer any rights to Sadanand on the 25th October, 1950. If, on the other hand, the final decree passed *ex parte* could be set aside, the rights of Munnu Lal and Nathu Lal could be revived and they could also make a sale of the property. They have made a sale of the property on the 25th October, 1950. They were bound to make good their title to the vendee and under these circumstances an application could be maintained for the setting aside of the *ex parte* decree. It would be difficult, therefore, to say that Munnu Lal had no right left in him to make an application for the setting aside of *ex parte* decree under Order IX, rule 13 because of this transfer deed, dated the 25th October, 1950.

The last submission of the appellants was that the decree against Nathu Lal was a good decree inasmuch as he had been served with a notice before the decree was passed and the decree against Nathu Lal could not be set aside. Order IX, rule 13 provides for the setting aside of a decree against those defendants also who do not make an application for the setting aside of the decree if it appears that the decree is one and indivisible and cannot be set aside against one particular defendant. I wish to express no opinion as to whether Munnu Lal had or had not been served, or whether Munnu Lal had knowledge of the application for the passing of a final decree, as that will be the subject of decision by the trial court as a result of the order of remand.

No other point has been pressed in arguments.

As a result, the appeal fails and is dismissed. The costs in this appeal shall be costs in the cause. The stay order is discharged.

Appeal dismissed.

CIVIL MISCELLANEOUS

*Before Mr. Justice Bhargava and Mr. Justice Tandon**

KRISHNA CHANDRA GUPTA

(PETITIONER)

v.

TAMBRESWAR PRASAD AND OTHERS

(RESPONDENTS)

Election—Election Petition—Treasury Chalan—Head of Account "P" not scored out—Treasury Chalan, validity of—Representation of the People Act, 1951, s. 19 (3), scope of.

An election petition was filed and it was accompanied by a treasury chalan. The treasury chalan clearly showed that deposit for security for costs was made in the correct head prescribed by the Government of India; the head is given as:

Central (Civil) Section. P—Deposits and advances—
Part II—Deposits not bearing interest—(c) Other
Deposits accounts—Civil Deposits—Revenue Deposits—Deposits for Election Petitions.

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The Election Tribunal dismissed the election petition on the ground that the treasury chalan did not indicate that there had been compliance with the requirements of s. 117 of the Representation of the People Act.

Held, that the treasury chalan filed by the petitioner did show that the necessary deposit as security for costs had been made in favour of the Election Commission and the order of the Election Tribunal was bad in law and was set aside.

Held, further, that although in the treasury chalan on the right hand corner the letter "P" was not scored out, this does not affect the validity of the treasury chalan, as the correct head of account had been described, which clearly indicated that it was a Central deposit and not a Provincial deposit. The treasury chalan was held to be valid in law.

Civil Miscellaneous Writ, no. 275 of 1957, under Articles 226 and 227 of the Constitution of India.

The facts appear in the judgment.

M. P. Srivastava, Umesh Chandra and Beni Madho (of Sitapur) for the applicant.

Standing Counsel for the opposite-party no. 4.

The judgment of the Court was delivered by—

BHARGAVA, J. :—Krishna Chandra Gupta has filed this petition under Article 226 of the Constitution praying for the issue of a writ of certiorari to quash an order of the Election Tribunal, dated 30th November, 1957, by which the election petition presented by the petitioner was dismissed in limine under section 90 (3) of the Representation of the People Act on the ground that the petitioner had not complied with the requirements of section 117 of the Representation of the People Act.

When the election petition was filed by the petitioner, it was accompanied by a treasury chalan but the Election Tribunal dismissed the petition on the ground that the treasury chalan did not indicate that there had been compliance with the requirements of section 117 of the Representation of the People Act. One defect found was that, in the chalan, it was not written in so many words that the deposit was being made in favour of the Secretary of the Election Commission. So far as this defect is concerned, it is immaterial because the

treasury chalan clearly shows that the deposit for security for costs was made in the correct head prescribed by the Government of India.

The head is given as:

Central (Civil) section. P—Deposits and advances
Part II—Deposits not bearing interest—
(c) Other Deposits accounts—Civil Deposits—Revenue Deposits—Deposits for Election Petitions.

This head is identical with the head which was prescribed by the Government of India for deposits to be made by petitioners filing election petition in respect of security for costs in favour of the Secretary to the Election Commission under section 117 of the Representation of the People Act. The view that a deposit under such a head is sufficient and the entry of this head in the chalan shows that the deposit was made in favour of the Secretary of the Election Commission was expressed by this Court in *Bhuvanesh Bhushan Sharma v. Hakim Haziq* (1). In the judgment of that case all the relevant considerations which had to be taken into account in deciding this question have already been considered in detail. We entirely agree with the view taken in that case and consequently hold that the treasury chalan filed by the petitioner with his election petition in the present case did show that the necessary deposit as security for costs had been made in favour of the Election Commission.

One new point has been urged by the learned counsel for the opposite party no. 1 in this case is based on the circumstances that, in the treasury chalan, at the right hand corner, there is the letter capital "P" printed, which would indicate that the deposit was made in the Provincial head and not in the Central head. Learned counsel has drawn our attention to the relevant rules contained in the U. P. Financial Handbook where the use of this form is prescribed. It has already been held by this Court in the case of *Sri Bhuvanesh Bhushan Sharma* (1), cited, above that the deposits made under section 117

(1) Civil Misc. Writ no. 2603 of 1957, decided on 16th June, 1958.

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of the Representation of the People Act, the rules contained in the U. P. Financial Handbook do not apply. These deposits are governed by the Central Government Treasury Rules. Under those rules, the deposits should have been made on the Form no. T. R. 6, but it seems that that form was not available as deposits had to be made in any treasury of the State of Uttar Pradesh and not in the treasury maintained by the Central Government. In the circumstances, the use of the form prescribed by the rules contained in the U. P. Financial Handbook cannot be held to affect the validity of the deposit. It is true that, in the U. P. Financial Handbook, there are two provisions relating to the marking of the chalan in such a way as to indicate whether the deposit is a Central Deposit or a Provincial Deposit. Firstly, there is rule 31-B contained in Part I, Volume V, U. P. Financial Handbook, in which it is laid down that, in order to enable the treasury to credit the amount to the revenue of the Province and the Central Government separately, the word "Provincial" or "Central" should be prominently noted on each chalan as the case may be, and that as an abbreviation letters "P" and "C" may be used. It is to be noted that under this rule the principal requirement is that the word "Provincial" or "Central" should be prominently noted on each chalan and it is only as a matter of convenience that permission is granted not to put down the words "Provincial" or "Central" in full but to indicate them by using the abbreviation "P" or "C". In the chalan, which accompanied the election petition in the present case, the word "Central" is quite prominently written in column 5 the heading of which is "Head of Account". This word "Central" was clearly written to indicate that it was a central deposit and that the amount should be credited to the Central Government and not to the State Government. The printed letter "P" at the right hand top corner was certainly not scored out but that would be immaterial when the correct head of account is described so as to indicate clearly that it was a Central Deposit and not a Provincial Deposit. The principal requirement of putting down the word "Central" or "Provin-

cial" in full having been complied with, the existence of the abbreviated letter "P" has to be ignored. The other rule to which our attention has been drawn by the learned counsel is rule 505-C contained in Part II of Volume V of the U. P. Financial Handbook where it is laid down that "all officers authorized to pay into or draw money from the treasury or the bank should mark all chalans, vouchers, cheques, bills, etc. prominently at the top right-hand corner with the letter 'C' or 'P' for 'Central' or 'Provincial' as the case may be". So far as this rule is concerned, it is clearly inapplicable to the case before us. As has already been held in the case of *Sri Bhuvanesh Bhushan Sharma*, cited above, the Government of India had promulgated rules under which the Election Commission or the Secretary of the Election Commission was not required to sign the chalans or to issue any authority for deposit of the money tendered or deposited under section 117 of the Representation of the People Act. The Election Commission or the Secretary, Election Commission, not being required to sign the chalan, no occasion could arise for them to enter the letter "C" or "P" at the right-hand top corner of the chalan. Rule 505-C of Part II of Volume V of the U. P. Financial Handbook is merely in the nature of instructions to officers ; and, if those officers are not required to act at all, there can arise no question of such a rule being applied or being complied with.

We may also note the fact that the head of account in the chalan is given in full detail and that there is nothing at all on the record to indicate that any similar head of account had ever been opened by the Government of the State of Uttar Pradesh. The rules and the various government orders published which have been brought to our notice so far merely show that such a head has been opened only in respect of a Central account. There being no such Provincial account with the details which are mentioned in the chalan, it is clear that the amount tendered with this chalan could not possibly have been credited in the accounts of the Government of the State of Uttar Pradesh. It, however, appears from a certified copy of the statement of Shahid Ali, Head

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Copyist in the Collectorate, Sitapur, that at the time when this deposit was made, he was a treasury clerk and after the deposit was made he actually made an entry in respect of this deposit in the register of accounts of the State Government instead of making an entry in the register of the accounts of the Central Government. The reason given by him for adopting this course is on the face of it absurd. He states that he did notice that the word "Central" was written under "Head of Account" and yet he made the entry in the treasury register of the State Government accounts because the receipt had been passed by the State Bank. So far as the State Bank was concerned, it was made bound to pass the receipt even if the deposit was meant for the Central Government accounts and not for the accounts of the State Government. It seems that the clerk was misled by the fact that the capital letter "P" printed at the right-hand corner of the chalan had not been crossed out. He forgot to notice that this was a deposit of such a nature that the officer authorizing the deposit was not required to countersign it or to put such a capital letter in the chalan. He also completely ignored the fact that in the accounts of the State Government there was no head having the description given to the head of account in this chalan. How he then credited this amount in the State Government accounts cannot be understood. In any case, if such an error has been made by him, it is immaterial because once the amount has been deposited in the proper head, the amount is available to the Election Commission. Any directions passed by the Election Commission under section 121 of the Representation of the People Act are bound to be carried out and this money deposited as security for costs under section 117 of the Representation of the People Act must be paid out in accordance with those orders.

As a result, we hold that the order rejecting the petition under section 90 (3) of the Representation of the People Act was incorrect and must be set aside. We consequently, allow this petition with costs and quash the order of the Election Tribunal, dated 30th November, 1957.

Election Tribunal must further proceed with the trial of the election petition.

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Application allowed.

APPELLATE CIVIL

*Before Mr. Justice Bhargava and Mr. Justice Tandon**

STATE OF UTTAR PRADESH AND OTHERS
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February, 18

MOHAR SINGH (RESPONDENT)

Notified Area Committee—Removal of the Member by the Commissioner after explanation—United Provinces Municipalities Act, 1916, s. 40, sub-s. 4, scope of—"Explanation", meaning of.

The District Magistrate, Gonda, under directions from the Commissioner, issued notices, to the two members of the Notified Area Committee, Colonelganj, Gonda, under sub-s. 4 of s. 40 of the United Provinces Municipalities Act, asking them to explain within 15 days of the receipt of the notice why they should not be removed from the membership of the Notified Area Committee.

The two members submitted their explanation denying the charges. The Commissioner, afterwards, removed the two members from the membership of the Notified Area Committee. These two members filed a writ petition against the order of the Commissioner.

Held, that an opportunity to explain means an opportunity to the person charged to offer his own reply and account for the allegations made against him. The further right to cross-examine the witnesses or to examine his own witness is not implied in it.

Held, further, that the right to explanation under s. 40 (4) of the United Provinces Municipalities Act is a statutory right. Such a right is neither a common law right nor a right at law. The application of the rules of natural justice do not apply to such a right. The procedure prescribed by the Act itself in that behalf will have to be followed.

Dr. Pyare Lal Gahlot v. State of Uttar Pradesh (1),

*Sitting at Lucknow.

(1.) A. I. R. 1953 All. 195.

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President, Municipal Board, Shahjahanpur v. District Magistrate, Sahajahanpur (1) relied on.

Special Appeal No. 17 of 1956 from a decision of V. D. BHARGAVA, J., dated 24th August, 1956, in Civil Miscellaneous Writ no. 67 of 1956.

The facts appear in the judgment.

The Standing Counsel for the appellants.

N. Banerji for the respondent.

The judgment of the court was delivered by—

TANDON, J.:—These two appeals arise out of two Civil Miscellaneous Applications, (O. J.), nos. 67 and 68 of 1956, filed on behalf of two members of Notified Area Committee, Colonelganj, Gonda, being Mohar Singh and Ram Dayal Shukla. There were complaints against these members whereupon the District Magistrate, Gonda, under directions from the Commissioner, issued notices to them under sub-section (4) of section 40 of the U. P. Municipalities Act requiring them to explain within 15 days of the receipt of notice why they should not be removed from the membership of the Notified Area Committee. On the notices being served, the two respondents, namely, Mohar Singh and Ram Dayal Shukla, submitted their explanations denying the charges. Afterwards the Commissioner removed the two respondents from the membership of the Notified Area Committee. A little later, Mohar Singh and Ram Dayal Shukla filed Writ Petitions nos. 67 and 68 of 1956, challenging the order of removal passed by the Commissioner and asking that the same be quashed. The learned Single Judge allowed both the petitions and quashed the order of the Commissioner, dated the 22nd of March, 1956, by which they had been removed from the membership of the Notified Area Committee, as also the consequential order, dated the 31st of March, 1956. The opposite parties in the petitions were the State of Uttar Pradesh, the President, Notified Area Committee, Colonelganj, district Gonda, the District Magistrate, Gonda and the Commissioner of Faizabad Division. They have now appealed against the said order of the learned single Judge.

(1) A. I. R. 1956 1 All. 389.

Section 40 of the United Provinces Municipalities Act, 1916, which is applicable to Notified Areas also, makes provision for removal of a member of a Notified Area Committee. It says that a member may be removed on the ground that he has flagrantly abused, in any manner, his position as a member of the Board. Sub-section (4) of this section, however, requires that, when the prescribed authority proposes to take action under the above provision, an opportunity of explanation shall be given to the member concerned, and when such action is taken, the reasons thereafter shall be placed on record. The section thus requires an opportunity of explanation to be given to the member concerned before he is removed from his office. The learned Single Judge held that "when the Act provides an opportunity of giving explanation to the member, it also implies that he should be permitted to cross-examine the witnesses against him and, if necessary, to examine his witnesses and produce evidence in defence. It would be highly improper to allow removal of members without giving them an opportunity, though it may be on statements not on oath which may be altogether false. . . ." In both the cases, admittedly, no such opportunity was afforded to the two respondents. Accordingly, the learned single Judge set aside the order of removal passed against them. The learned counsel for the appellants has contended that section 40 does not contemplate any notice to show cause against the action proposed to be taken. On the other hand, as contemplated, a member, before he is removed, shall be given an opportunity to explain. An opportunity to explain does not, according to him, imply that the person asked to explain will also be entitled to cross-examine witnesses who might have been examined or to be heard by the authorities issuing notices or to adduce evidence in support of his explanation. It simply authorizes him to furnish explanation on the allegations against him in the notice. An opportunity to show cause is, in our opinion, a wider expression. It implies not merely an opportunity to explain but an opportunity to adduce evidence, etc., also, in support of the representation. An opportunity to explain, on the

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other hand, means an opportunity to the person charged to offer his own reply and account for the allegations made against him. The further right to cross-examine any witness or to examine his own witness, etc., is not implied in it. The learned Single Judge was perhaps persuaded in his view to the contrary, as appeared from an expression contained in the early portion of the judgment, because an impression had been given to him that the District Magistrate had required the members concerned "to show cause within 15 days" why they should not be removed from the membership of the Notified Area Committee. No doubt, subsequently he also observed that an opportunity of explanation included an opportunity to examine witnesses and, if necessary, to cross-examine witnesses and produce evidence in defence, but the difference between an opportunity to show cause and an opportunity of explanation was evidently overlooked. With great respect, we are unable to accept the view that an opportunity of explanation included an opportunity for these other things also.

One other argument, which found favour with the learned Judge in the view held by him, was that denial of these other rights would be contrary to rules of natural justice. The right of explanation under section 40 of the Act belongs to a member under sub-section (4). The right of membership including the right to continuance as such and removal therefrom is the creature of the United Provinces Municipalities Act, 1916. It is neither a common law right, nor a right at law. In order to decide whether a member has been rightly removed, etc., the provisions of the United Provinces Municipalities Act itself have to be relied upon. Any question as to the application of the rules of natural justice will not and do not arise. The procedure prescribed by the Act itself in that behalf will need to be followed. Sub-section (4) of section 40 has merely provided that, whenever it is proposed to take action under sub-section (3), which relates to the removal of a member, an opportunity of explanation shall be given to him, and when such action is taken, the reason therefor shall be placed on record. The section does not provide

any opportunity for evidence, etc. It simply allows an opportunity of explanation. Unless, therefore, the expression "Opportunity of explanation" can be said to include an opportunity to adduce evidence and to cross-examine witnesses, etc., the person proceeded against cannot claim such a right. But, as held above, the expression "Opportunity of explanation" does not imply any such right.

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Section 30 of the United Provinces Municipalities Act, which relates to supersession or dissolution of a Board, has made provision that, if the Board persists in making default in the performance of any duty imposed upon it by or under that Act or any other enactment, or is exceeding or abusing its powers, the State Government may dissolve or supersede it; but the State Government is required to take into consideration the explanation of the Board before it makes such order. This provision was considered in *Dr. Pyare Lal Gahlot v. The State of Uttar Pradesh, Lucknow* (1) by a Division Bench of this Court and it was held:

"Section 30 does not require that the State Government should 'give an opportunity to the Board to show cause' against the action proposed to be taken against it. It is only in cases where the statute casts a duty on the authority passing the order to give an opportunity to show cause that it is necessary to take evidence or to make full enquiries. In a case where the statute only requires the explanation to be considered, it is enough if the authority gives a reasonable opportunity for submission of the explanation and considers that explanation."

Section 40 (4) of the Act, though slightly differently worded, in effect makes a similar provision, namely, that before taking action under section (3), an opportunity of explanation shall be given to the member concerned. The opportunity to explain has to be an opportunity

(1.) A. I. R. 1953, All. 195.

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to explain and not to show cause. The person proceeded against is entitled, under the above provision, to offer his own account of the allegations made against him and that explanation of his has to be considered before making an order under sub-section (3).

Section 48 of the Act, which relates to removal of a President, also contains a very similar provision. It provides that, before giving a warning or removing a President from his office, an opportunity shall be given to him to explain the conduct on which it is proposed to take action against him. This provision was considered in two cases, one reported in *President, Municipal Board, Shahjahanpur v. District Magistrate, Shahjahanpur* (1), and again in *Gaya Prasad Azad v. The Commissioner, Faizabad Division, Faizabad at Lucknow* (2) and it was held that an opportunity to explain does not contemplate an opportunity to adduce evidence or to cross-examine witnesses, etc. The same view was taken by the other member of this Bench in *Mohammad Umar Ansari v. Deputy Commissioner, Bara Banki at Lucknow* (3). We are, therefore, of the view that sub-section (4) of section 40 does not require that the person proceeded against has to be allowed an opportunity to cross-examine witnesses or to adduce evidence. All that the section requires is that an opportunity of submitting an explanation shall be given to the member concerned. This was given in both these cases.

In view of what has been said above, these two appeals should succeed. They are accordingly allowed and the orders passed by the learned Single Judge are set aside and the writ petitions concerned are dismissed. Costs here and before the learned Single Judge shall be borne by the parties.

Appeal allowed.

(1) I. L. R. [1956] All. 369.

(2) Civil Misc. Writ No. 235 of 1956 decided on 11th Feb. 1958.

(3) Civil Misc. Writ 100 of 1957 decided on 12th Sept. 1957.

APPELLATE CIVIL

Before Mr. Justice Gurtu

(On a difference of opinion between Mr. Justice Agarwala and Mr. Justice Upadhyaya)

JWALA PRASAD (APPELLANT)

v.

JWALA BANK LTD., (IN LIQ.) (RESPONDENT)

1957
March, 14

Indian Companies Act, 1913, s. 228—Winding up of Company—
Contract of service with Chairman—Contract, if comes to an
end—Salary allowable, principle of.

An agreement was entered into between Jwala Bank Ltd. and Jwala Prasad whereby it was agreed that Jwala Prasad shall be the Chairman of the Board of Directors for twenty years certain with a salary of Rs.2,000 per month plus certain allowances. After about ten years the Bank came into liquidation. Jwala Prasad claimed his salary for the remaining period of his contract of service.

Held (per AGARWALA and GURTU, JJ.—UPADHYA, J., dissenting) that Jwala Prasad was not absolutely or unconditionally entitled to claim his full salary from the date the liquidator took charge of the company to the date when the period of the term of his contract with the company would expire but the claim would be evaluated at the date of winding up under s. 228 of the Indian Companies Act after making a deduction for the fact that he would be free to do any business that he liked or to seek the employment of his choice.

Case-law discussed.

Special Appeal no. 132 of 1955 from a decision of Brij Mohan Lal, Company Judge, dated the 26th April, 1955, in Appeal no.

The facts appear in the judgment.

Ambika Prasad for the Appellant.

Jagdish Swarup for the Respondent.

AGARWALA, J. :—This is a special appeal against the judgment of the learned Company Judge dismissing in part the appeal preferred by the appellant Jwala Prasad against the rejection of his claim by the Official Liquidators.

The Jwala Bank was originally a private bank. It was converted into a limited concern in the year 1938. At the time of conversion an agreement was entered into between the Jwala Bank Limited and Sri Jwala Prasad

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appellant whereby it was agreed that Jwala Prasad shall be the Chairman of the Board of Directors of the Jwala Bank Limited for twenty years certain with a salary of Rs.2,000 per month, a free furnished house and certain traveling allowances. The Bank continued to function for about ten years when on the 12th April, 1948, it stopped its business on receipt of a direction from the Government to do so, and on the 1st August, 1949, an application for winding up was made. The Bank was wound up by an order of the 17th February, 1950, and Official Liquidators were appointed to take charge of the assets of the Bank. Jwala Prasad lost no time in preferring a special appeal against this order and on the 24th February, 1950, the operation of the winding up order was stayed by the appellate Bench. The appeal was, however, dismissed on the 24th October, 1950. The Official Liquidators took charge of the assets of the Bank on the 1st November, 1950. The next day Jwala Prasad filed his claim for a sum of Rs.8 lakhs, 75 thousand, in respect of his (a) monthly salary from 1st July, 1939 to 30th June, 1946, from 1st June, to 31st October, 1950 and from 1st November, 1950 to 30th June, 1956, (b) compensation for free furnished house, (c) travelling expenses, and (d) the price of good-will of his private concern transferred to the limited concern. The Official Liquidators allowed his claim for salary for the period between 1st June, and 31st October, 1950 and also allowed him salary for May, 1950, which he had by mistake not claimed but which was found due to him. They also allowed the claim for travelling expenses between 1st May, and 31st October, 1950 at the rate of Rs.300 per mensem. They did not allow the remaining amount for which Jwala Prasad filed an appeal under section 183 (5) of the Indian Companies Act before the learned Company Judge. The learned Company Judge allowed the claim for travelling expenses incurred in going to places beyond Greater Bombay on account of the business of the Bank during the period beginning from the 1st June, 1950, and ending with the 31st October, 1950, with a halting allowance at the rate of Rs.50 per day. He rejected the rest of the claim.

In this appeal the appellant's grievance is with regard to three items only :

- (1) Past salary from 1st July, 1939, to 30th June, 1946, at the rate of Rs.2,000 per mensem—Rs.1,68,000.
- (2) Future salary from 1st November, 1950, to 30th June, 1958, at the same rate—Rs.1,84,000.
- (3) Price of good-will—Rs.5,00,000.

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As regards the past salary the case for the Official Liquidators is that Jwala Prasad had given up his claim for this amount. This plea is fully borne out from the material on the record. The learned Company Judge has pointed out that in the balance-sheets of 1946, 1947 and 1949 there are statements on behalf of the Board of Directors signed by Sri Jwala Prasad as Chairman to the effect that the salary due to Sri Jwala Prasad has been foregone by him and that the total amount comes to Rs.1,92,000. Sri Jwala Prasad admitted his signatures on these statements and the correctness thereof. Under section 63 of the Indian Contract Act a promisee may dispense with or remit in part or in whole the performance of a promise made to him. The sum payable to Sri Jwala Prasad having once been foregone cannot be claimed now, even though the act of foregoing was done without any consideration.

Apart from this, the major portion of the claim is palpably barred by limitation. In order that the claim may be made before the official liquidator it should be within time at the date of the order of winding up. The date of the winding up would be treated as the 1st of August, 1949, when the application for winding up was made. The claim for the past salary from 1st July, 1939, to 30th June, 1943, would be barred by limitation, even if the period of limitation be considered as six years under Article 116 of the Limitation Act. The balance-sheets do not contain any acknowledgment of an existing liability and, therefore, cannot be treated as acknowledgments which would extend the period of

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limitation within the meaning of section 19 of the Limitation Act.

The second item of the claim is about the future salary from the date the Liquidator took charge of the assets of the Bank up to the end of the period of 20 years mentioned in the agreement above referred to. The learned Company Judge was of the opinion that this salary could not be claimed by the appellant because the contract under which the salary was to be paid had become void. With respect, I am unable to agree with this view.

After an order of winding up of a company has been made, all the property and assets belonging to the company are deemed to be in the custody of the court, and, on behalf of the court, in the custody of the Official Liquidator, *vide* section 178 of the Indian Companies Act. The result is that the company cannot transact any business through the Board of Directors. Such business as may be continued after the date of the order of winding up must be done by the Official Liquidator.

Under section 172 (3), the order of winding up is a notice of discharge to the servants of the company except when the business of the company is continued. Under section 78B (e), upon the winding up order being made, the contract of managing agency is determined, though without prejudice to the managing agent's right to recover any money recoverable from the company on account of the premature termination of his contract of management.

A winding up order has been held to operate as a *wrongful* dismissal of the servant or manager and the servant or manager has been held entitled to recover any monies recoverable from the company on account of the premature termination of the contract of service or management, (*vide* Halsbury's Laws of England, Simonds Edition, Vol. 6, page 654).

There is no express provision regarding the discharge of directors upon the company going into liquidation, but in the words of VAUGHAN WILLIAMS, J., the

constitution of the company comes to an end when the company goes into liquidation, see *Fowler v. Board's Patent Night Light Company* (1), and, therefore, the directors for all practical purposes, (though not for the purpose of appealing from the order of winding up itself), cease to hold their office and cannot carry on the business of the company, vide the *South Indian Mills Company, Ltd. v. Shivalal Motilal* (2).

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The principle applicable to the case of a servant or manager whose services are determined by an order of winding up, has been applied to the case of a managing director as well, vide *In re R. S. Newman Ltd.* (3). In *Measures Brothers, Ltd. v. Measures* (4) the head note of the case clearly brings out the effect of the decision when it says that "the winding up order operates as a wrongful dismissal of the defendant (director)". It was for this reason that in that case it was held that the defendant director was no longer bound by the covenant which restricted him from carrying on or being engaged or concerned in the same business which the company was doing before winding up.

In the present case the private banking concern, viz., the Jwala Bank, was handed over to a new banking concern, "The Jwala Bank Limited", upon conditions mentioned in the agreement entered into between the parties, and one of the conditions was that Jwala Prasad will be paid a sum of Rs.2,000 every month for 20 years certain. It is not equitable, therefore, that if by any reason, but not by the default of Jwala Prasad himself the company chooses to be wound up or is compulsorily wound up, (not because it has become illegal to carry on the business of the company but because the company has so acted that it has got to be wound up), Jwala Prasad should be deprived of the benefit of the contract upon the faith of which he transferred all his assets to the company.

(1) L.R. [1893] 1 Ch. 724, 730.

(2) () 36 I. C. 617.

(3) L. R. [1916] 2 Ch. 309.

(4) L. R. [1910] 1 Ch. 336.

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The doctrine of frustration of contracts as embodied in section 56 of the Indian Contract Act is not applicable to such cases. Section 56 runs as follows :

“An agreement to do an act impossible in itself is void.

“A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, become void when the act becomes impossible or unlawful”

The section has been recently explained by the Supreme Court in *Satyabrata Ghose v. Mungneeram Bangur & Co.*, (1), where their Lordships approved of the view of the Nagpur High Court in *Kesari Chand v. Governor General in Council* (2) that—

“The doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of parties”.

The words of this section “by reason of some event which the promisor could not prevent” are significant. Section 56 cannot apply to cases of non-performance of the contract due to events happening because of the default of the contracting party himself, *vide Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.* (3).

It is not disputed that the winding up of the Bank followed the direction of the Government of India prohibiting the Bank to stop accepting further deposits, because of the activities of the Bank jeopardising the interests of depositors. In the circumstances, it cannot be said that the Bank went into liquidation by reason of an act which the Bank could not control. In fact the Bank itself was responsible for bringing about the state of affairs which compelled the court to order its winding up. If the appellant himself as Chairman was

(1) A. I. R. 1954 S. C. 44.

(2) I. L. R. [1949] Nag. 718.

(3) A. I. R. 1935 P. C. 128, 130.

responsible for bringing about these conditions, he is not entitled to enforce the contract ; otherwise, it appears to me that the mere fact of winding up does not absolve the Bank from performing its part of the contract. If the passing of an order of winding up is an event which in all cases attracts the doctrine of frustration, I cannot see why it should have been held in the case of a manager that the winding up order amounts to his *wrongful* dismissal and why he should have been given the right to claim his salary or other dues on account of the premature termination of his contract of service.

No doubt, the appellant cannot claim payment of the amount due to him in full. The principle applicable to such cases has been laid down in *In re English Joint Stock Bank* (1), by SIR W. PAGE WOOD, V. C., as being "to ascertain the present value of the claim and to deduct from this amount something on account of the claimant being at liberty to obtain a fresh appointment" ; (see also Halsbury's Laws of England, Simonds Edition, Vol. 6, page 654). The appellant's debt, therefore, will have to be evaluated as at the date of winding up under section 228 of the Companies Act, after making a deduction for the fact that he is now free to do any business that he likes or to seek the employment of his choice. In my judgment, in a case like this, justice, equity and good conscience dictate that the deduction to be made on this account should be of half the amount which is found to be the present value of the appellant's claim. The present value of the appellant's claim on this account shall be determined by the learned Company Judge.

The last point that remains to be decided is about the compensation for the good-will. The appellant is clearly not entitled to anything on this account because nothing was said in the agreement, which was signed between the parties, as to the transfer of the good-will to the limited company. If it was transferred, no compensation was agreed to be paid for it. If it was not, the appellant can use it even now. The Official Liquidators have no use for it and do not claim to use it any longer.

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The appellant is, therefore, entitled to nothing on this score.

In the result, I would allow the appeal in part and would modify the order of the learned Company Judge and direct that in addition to the claim already granted by the Official Liquidators and by the learned Company Judge, the appellant is entitled to half the amount, which will be ascertained by the learned Company Judge, of the salary due to the appellant from 1st November, 1950, to 30th June, 1958, provided the appellant is not found guilty of any misconduct in the affairs of the Bank, which misconduct led to the winding up of the company. The question whether the appellant is guilty or not of any misconduct in the affairs of the Bank, which misconduct led to the winding up, may be determined in the misfeasance proceedings which are pending. If not determined in those proceedings, it will be determined by the learned Company Judge.

The parties will have costs according to their success and failure.

UPADHYA, J. :—This is a Special Appeal against the decision of the learned Company Judge dismissing in part the appeal preferred by the appellant Sri Jwala Prasad against the rejection of his claim by the Official Liquidators.

Sri Jwala Prasad was the proprietor of a private bank known as the Jwala Bank. After running the business for a period of nearly ten years, he decided to promote a public limited company styled as the Jwala Bank Ltd., which took over the business. An agreement, dated the 25th July, 1938, was entered into between the Jwala Bank Ltd. and Sri Jwala Prasad, whereby it was agreed that Sri Jwala Prasad should be the Chairman of the said company for a term of 20 years from the date of the registration of the company (1938) until "he of his own free will resigns" and he was not to be removed on any ground save and except his being found guilty of fraud by a competent court of law in the management and discharge of his duties as Chairman and

is found guilty of gross mismanagement of his duties as Chairman by a majority of three-fourth of the votes of the shareholders present at an extraordinary General Meeting called for the purpose. The remuneration payable was Rs.20,000 per month from the date of the registration of the company plus free furnished house and lighting. Travelling expenses and allowance was also payable in addition to this remuneration under the terms of the agreement. The Bank continued to function for about ten years. On the 12th April, 1948, it stopped its business on receipt of a direction from the Government of India to do so, and on the 1st August, 1939, an application for winding up was made. The Bank was wound up by an order of this Court, dated the 17th February, 1950, and Official Liquidators were appointed to take charge of the assets of the Bank. Sri Jwala Prasad preferred a Special Appeal against the order for winding up and an order for staying the order of winding up was issued on the 24th February, 1950. The appeal was ultimately dismissed on the 24th of October, 1950, and the stay order was discharged. The Official Liquidators actually took charge on the 1st November, 1950, and the next day Sri Jwala Prasad filed his claim for Rs.8,75,000 for his monthly salary from 1st July, 1939, to 30th June, 1946, from 1st June to 31st October, 1950, and from 1st November, 1950, to 30th June, 1958, and for compensation for free furnished house, travelling expenses and for the price of the good-will of his private concern transferred to the Limited Company.

The Official Liquidators allowed the claim for salary for the period from 1st May to 31st October, 1950. In doing this they allowed him salary from May, 1950, which he had by mistake omitted to claim, but which the Liquidators found was due to him. They also allowed the claim for travelling expenses incurred between 1st September and 31st October, 1950, at the rate of Rs.300 per mensem. They disallowed the balance of the claim and Sri Jwala Prasad filed an appeal under section 183 (5) of the Indian Companies Act to the learned Company Judge. The learned Company Judge

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allowed the claim for travelling expenses incurred by Sri Jwala Prasad in going to places outside Greater Bombay on the business of the company during the period from 1st June and 31st October, 1950, together with a daily halting allowance of Rs.50 on such trips. The rest of the claim was disallowed.

In the present appeal, the appellant has pressed his claim with regard to three items :

- (1) Salary from 1st July, 1939, to 31st June, 1946, at the rate of Rs.2,000 per mensem—Rs.1,68,000.
- (2) Salary from 1st November, 1950, to 30th June, 1958, (the date when the term of 20 years stipulated in the agreement expires), at the rate of Rs.2,000 per mensem—Rs.1,84,000.
- (3) Price of the good-will of his private concern—Rs.5,00,000.

The Official Liquidators contend that Sri Jwala Prasad has given up his claim for salary from 1st July, 1939, to 30th June, 1946, which forms the first item of the abovementioned claim. This contention is supported by the material on record. As pointed out by the learned Company Judge, there are statements in the balance-sheet for 1946, 1947 and 1949 made on behalf of the Board of Directors signed by Sri Jwala Prasad as Chairman to the effect that the salary in question had been foregone by him. Sri Jwala Prasad admitted his signature on these statements and the correctness thereof. Under section 63 of the Indian Contract Act a promisee may dispense with or remit in part or in whole the performance of a promise made to him. Having foregone the salary in question, it is not open now to Sri Jwala Prasad to make this claim.

It also appears, as observed by the learned Company Judge, that the claim for the salary up to 30th June, 1943, is barred by time. There are no acknowledgments of a liability within the meaning of section 19 of the Limitation Act, which might be held to extend the period of limitation.

The second item consists of the salary which the appellant claims from the date that the Liquidators took charge of the company to the date when the period of twenty years mentioned in the agreement expires. The appellant contends that he was bound to work as Chairman of the Board of Directors of the company for the above mentioned period of twenty years and the company was under a liability to pay him at the rates agreed upon for the entire period. This liability of the company could not be set at naught by the winding up order. The learned Company Judge, however, has not accepted this contention and has taken the view that the contract entered into by the company and Sri Jwala Prasad having become ineffectual, the parties were discharged from all obligations arising under the contract, and it was not open to Sri Jwala Prasad to enforce any claim that could be said to arise under the said contract.

Several cases have been placed by learned counsel for the respondent in support of the Liquidators' contention. In *Fowler v. Board's Patent Night Light Company* (1), VAUGHAN WILLIAMS, J., took the view that "on the making of a winding up order the powers of the directors came to an end". In that case the question related to the power to make calls and the learned Judge held that the "original power of the directors to make calls *ipso facto* comes to an end" when the order for winding up is passed. The directors, therefore, and the Chairman, who was also a director, could not continue to function as they did before and they are ousted and they ceased to function. Evidently it was not, therefore, possible for Sri Jwala Prasad to perform his part of the contract under the agreement mentioned above. The question is as to whether the company continued to be under a liability to pay him the remuneration settled in spite of Sri Jwala Prasad becoming unable to perform his part of the contract. In *Measures Brothers, Limited v. Measures* (2), the defendant, R. P. Measures, who was the director, had entered into an agreement with the company, to hold office as director for a period of seven years from 26th June, 1903, at a salary of £1,000 a year,

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(1) L.R. [1893] 1Ch. 724.

(2) L.R. [1910] 1Ch. 336.

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and to devote so much of his time and attention to the business of the company as might be necessary. The agreement further provided that he would not at any time thereafter, while he held the office of the director to the company or even seven years after ceasing to hold such office carry on or be engaged or interested in the business of the engineers or iron-founders, nor would he in any way compete with or do anything detrimental to the business carried on by Measures Brothers, Ltd. A Receiver and Manager of the assets and business of the company was appointed in a debenture-holder's action and on 13th October, 1909, an order was made for the compulsory winding up of the company. On receipt of a notice terminating his services, the defendant commenced to carry on his own business as an engineer. The plaintiff alleged that the defendant had in his possession certain lists of names and addresses and other information relating to the customers of the company which he had obtained while he was in the service of the company and that the defendant was using the information confidentially acquired by him as director for the purpose of enabling him to carry on the business on his own account. Action was commenced by the Receiver under the direction of the court for an injunction to restrain the defendant for a period of seven years from 13th October, 1909, from carrying on the business in breach of the agreement, which had been executed by him on 14th July, 1903, and for an order to deliver up all lists of the names and addresses of the company's customers copied or extracted by or at the instance of the defendant from the books of the company. An injunction was also sought to restrain the defendant for making use of any information obtained by him from such lists or the copies. It was contended that the terms of the agreement could be enforced only so long as the defendant held the office of a director and if on the winding up order being passed, the office ceased, there was no breach of the agreement which could be made the subject-matter of an action. JOYCE, J., held as follows :

"I hold that no man who is in the employment of another is entitled to use or even take a

copy, for his own private purposes, of any document of his employer which comes to his hands or to which he has access in the course of his employment. Consequently, I hold that the plaintiffs are entitled to relief in respect of that matter. I am of opinion that not only was a person in the position I have mentioned not entitled to make such a list or make a copy of any document, but he should be ordered to give up any such document or any copies that he had made from it. . . ."

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Relating to the other relief claimed for injunction, the learned Judge took the view that "when a Manager is engaged by a company for a term of years, a compulsory order for winding up is a dismissal or discharge of that Manager". The learned Judge, however, further took the view that the case before him was not "a simple case of a Manager". He held that it was the case of "a director who was appointed manager by a special and conditional agreement of service". The agreement entered into between the parties provided that he was to get a directorship for seven years at a salary of Rs.1,000 a year and there was also a further provision that at the expiration of the term of seven years of service he should be engaged upon a salary agreed upon. The learned Judge deciding the case considered the case of a director to be the same as that of a manager so far as the effect of a winding up order is concerned. He observed at page 345—

"Now, whether the defendant technically ceased to be a director in name upon the making of the compulsory order to wind up or not I do not know, but he had no more work to do, and he had no more pay, and his employment ceased. It was fairly admitted and agreed by the other side, in fact it is common ground, that in truth and substance he ceased to be a director."

The learned Judge further held that the plaintiffs were not entitled against the defendant to specific performance

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of a clause of the special agreement without performing and they could not perform it—the clauses of that agreement contained in favour of the defendant. The view taken was that because of the winding up order the company became incapable of acting according to the clauses of the agreement and in that event it was only proper to hold that a director who under an agreement was bound to perform certain duties stood discharged.

The same view was taken by the Madras High Court in the *South Indian Mills Company v. T. Sriman Kanthimathinatha Pillai* (1). The learned Judges observed that “after a winding up order was passed the directors of a company ceased to be such”. The doctrine of law in *Measure's* case mentioned above is the doctrine of frustration of contract, which is embodied in section 56 of the Indian Contract Act. Section 56 runs as follows:

“An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.”

This section was recently considered by the Supreme Court in *Satyabrata Chose v. Mungneeram Bangur & Co.* (2). Their Lordships examined the various aspects of the doctrine of frustration as understood in English Law and observed that the differences in the way of formulating legal theories “really do not concern us” so long as we have statutory provision in the Indian Contract Act. MUKHERJEA, J., (as he then was), observed :

“In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in section 56 of the Contract Act. Taking the word ‘impossible’ in its practical and literal sense, it must be borne in mind that section 56 lays down a rule of positive

(1). 1916 () 36 I. C. 617.

(2) A.I.R. 1954 S.C. 44

law and does not leave the matter to be determined according to the intentions of the parties."

The learned Judge further observed:

"Although various theories have been propounded by the Judges and jurists in England regarding the judicial basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility."

The doctrine of frustration is, as observed by the Supreme Court in the case mentioned above, "an aspect or part of the law of discharge of contract by reason of supervening impossibility" of the act agreed to be done.

The law has been succinctly stated by Lord HALSBURY in his Laws of England, (Hailsham Edition, page 185), as follows :

"The doctrine of frustration operates to excuse further performance where (i) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted *on the basis that some fundamental thing or state of things will continue to exist* or that some particular person will continue to be available . . . , and (2) before breach *performance becomes impossible. . . without default of either party and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties.*"

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It appears necessary to consider (1) whether the parties contracted on the basis that some fundamental state of things will continue, (2) whether the performance has become impossible, and (3) whether this has happened without default of either party and due to a fundamental change of circumstances beyond the control and original contemplation of the parties.

The very nature of the agreement in this case implies that the parties proceeded on the assumption that this company would continue to run. There is no term in the agreement as to what should happen if the company should cease to function as a running concern. Employment of Sri Jwala Prasad as the Chairman could be possible only if the company ran its normal course and was not wound up. It is hardly possible to hold that the parties agreed that Sri Jwala Prasad should work for the company and receive the remuneration agreed upon even if the company was wound up.

That the performance has become impossible is not disputed. The question is whether it has become impossible because of a default by any of the parties. In *Constantine (Joseph) S. S. Line Ltd. v. Imperial Smelting Corporation Ltd.* (1) it was held that the defence of frustration can be defeated by proof of fault, but the burden of proving the default lies on the party alleging it.

Sri Jwala Prasad has adduced no evidence to prove that the company was guilty of any default. Had he made any such allegation, the facts would have been examined by the learned Company Judge to see how far the company or Sri Jwala Prasad was responsible for bringing about the liquidation. The appellant is, in my opinion, not entitled to have these matters investigated at this stage by setting up a new case. Apart from this, it is open to doubt as to whether in the circumstances of this case the present situation which has rendered the performance of the contract impossible, is more directly due to the Court's order directing the company to be

(1) L.R. (1942) A.C. 154.

wound up or to the more remote conduct of the company and as to whether the latter would not in law be held to be too remote a cause for the frustration. It appears to be fairly clear that the performance of the contract in this case has become impossible owing to a fundamental change of circumstances beyond the control and original contemplation of the parties.

In the present case the winding up order made it impossible for the company to carry on its business; it became obviously unnecessary to have any director manager or staff to carry on that business. In fact, when the order had the effect of stopping the normal functioning of the company and of putting it into liquidation, no question of the company needing the services of a director or manager or a Chairman could possibly arise. After the order it was no more possible for the company to retain or utilize the services of the appellant as Chairman of the Board of Directors nor was it possible for the appellant to perform such duties any more. The agreement, therefore, had to come to an end and the parties stood discharged from their obligations. No question could, therefore, arise of any payment of salary as claimed by the appellant.

The third claim was of rupees five lakhs as the price of the good-will. The agreement between Sri Jwala Prasad and the company has nothing to say about the good-will. If the parties contemplated that Sri Jwala Prasad should receive any amount in consideration of the good-will, it would have certainly found mention in that agreement. If Sri Jwala Prasad agreed to transfer the business of his private company to the Limited Liability Company as far back as in 1938, it is not open to him now to put forward a claim for the price of what he alleges to have been his good-will in his private concern. The company was under no liability to pay for any good-will and the Liquidators are under no liability to pay for it either.

In the light of the above observations I am of opinion that the appeal must fail. I would, therefore, dismiss it with costs.

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By the Court—As we differ in our opinions as to the result of the appeal, we refer the following question to be decided by a third Judge:

“Whether in the circumstances of the case the appellant is entitled either absolutely or subject to certain conditions to claim his salary or any part thereof from the date the Liquidators took charge of the company to the date when the period of 20 years in his contract with the company will expire.”

GURTU, J.:—On a difference of opinion between AGARWALA, J., and UPADHYA, J., in Special Appeal no. 132 of 1955, the following question has been referred to me for answer :

“Whether in the circumstances of the case the appellant is entitled either absolutely or subject to certain conditions to claim his salary or any part thereof from the date the Liquidators took charge of the company to the date when the period of 20 years in his contract with the company will expire?”

The circumstances of the case are as follows :

There was a private Bank named as “The Jwala Bank”. It was converted into a limited concern in the year 1938. At the time of the conversion, an agreement was entered into between the Jwala Bank Limited and Sri Jwala Prasad appellant. The terms of the agreement, dated the 25th of July, 1938, with which I am concerned in this appeal, run as follows :

“1. That Mr. Jwala Prasad, Banker, Agra, is appointed the Chairman of the company on a term of 20 years only from the date of registration of the company until he of his own free will resigns and his appointment as Chairman shall not at any time

during the said period be liable to be revoked or cancelled, nor he shall be removed from the said office on any ground or for any reason whatsoever save and except his being found guilty of fraud by a competent court of law in the management or discharge of his duties as such Chairman or he is found guilty of gross mismanagement of his duties as Chairman by a majority of three-fourth of the votes of the shareholders present at an extraordinary General Meeting called for the purpose.

2. The company shall during the continuance of this agreement pay to the said Mr. Jwala Prasad, Banker, Agra, as Chairman—
 - (a) Remuneration of Rs.2,000 (Two thousand) per month from the date of the registration of the company plus. . . .”

The Jwala Bank Limited continued to function for about ten years but on the 12th of April, 1948, pursuant to an order of the Central Government made in consequence of an inspection carried out at the instance of the Reserve Bank of India by one of its officers, the Bank stopped its business because the order of the Central Government prohibited it from receiving deposits. I understand that the said order was passed under the Banking Companies (Inspection) Ordinances, 1946-48. Then an application was made by a creditor of the company that the company be wound up on the ground that it was unable to pay its debts and, in consequence of that application, the Bank was wound up by an order, dated the 17th of February, 1950, and an official liquidator was appointed to take charge of the assets of the Bank. A special appeal was preferred by Sri Jwala Prasad against this order and, in consequence, the operation of the order was stayed on the 24th of February, 1950, by the appellate Bench. The appeal was ultimately dismissed on the 24th of October, 1950. The Official Liquidator then took charge of the assets of the Bank on the 1st of

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November, 1950. The next day Sri Jwala Prasad filed a claim for Rs.8,75,000. The part of the claim, with which I am concerned in this appeal, related to monthly salary from the 1st of November, 1950, to the 30th of June, 1958.

The question that I have to consider is whether Sri Jwala Prasad is entitled to his salary at the contractual rate for this period either absolutely or subject to certain conditions, or whether he is not so entitled?

Mr. Justice AGARWALA was of the view that Sri Jwala Prasad was entitled to half the amount which he claimed, provided that Jwala Prasad was not found guilty of any misconduct in the affairs of the Bank, which misconduct led to the winding up of the company. Mr. Justice AGARWALA directed that the question "whether Sri Jwala Prasad was guilty or not of any misconduct in the affairs of the Bank, which misconduct led to its winding up" was to be determined in the miscellaneous proceedings, which are pending. The reference appears to be to misfeasance proceedings which are pending in this Court. Mr. Justice AGARWALA further ordered that if the question of the appellant's misconduct, as above, was not determined in those proceedings, then it should be determined by the learned Company Judge.

The view of Mr. Justice UPADHYA was that the company was under no liability to pay the salary money claimed.

The first question which arises is whether the winding up order operates as a dismissal of Sri Jwala Prasad. No notice of dismissal was actually served on him to this effect by the Official Liquidator. The position seems to have been accepted in England that an order for the compulsory winding up of a company determines the powers of directors and effects their discharge and that it also puts an end to the employment of a Managing Director. [See *Fowler v. Board's Patent Night Light Company*, (1) and *Fowler v. Commercial Timber* (2)].

So far as the Indian Companies' Act is concerned, there is no express provision regarding the discharge of

(1) L.R. [1893] 1 Ch. 724, 730. (2) L.R. [1930] 2 K.B. 1.

Directors or the dismissal of a Managing Director upon a company going into liquidation, but it is evident from the relevant sections of the Indian Companies' Act that the consequences of winding up are that the Directors can no longer discharge their duties. The Liquidator takes into his custody, or under his control, all the property, effects and actionable claims to which the company is entitled and all such property and effects of the company are deemed to be in the custody of the court as from the date of the order for the winding up of the company. [See section 178 of the Indian Companies Act, (Act VII), of 1913, and section 456 of Act no. 1, of 1956.] The Liquidator in a winding up by the court has the power, with the sanction of the court, to carry on the business of the company, so far as may be necessary, for the beneficial winding up of the company; (see section 179 of the 1913 Act and section 457 of the 1956 Act). Section 179 of the old Act and section 457 of the present Act also indicate the powers of the Liquidator which are to be exercised with the sanction of the court. It is enough to quote these provisions to show that there is very little left which the Directors or a Managing Director can do after a company has been wound up. In these circumstances, the winding up order virtually brings the office of the Directors and Managing Directors to an end and it may be said that they cease to hold their office once a winding up order is passed for they cannot carry on the business of the company themselves. [See the *South Indian Mills Company Ltd. v. Shivalal Motilal* (1)]. So far as the servants of the company are concerned, under section 172(3) of the previous 1913 Act, the order of winding up constituted a notice of discharge to the servants of the company except when the business of the company is continued. Under section 87-B(e) of the previous Act upon a winding up order being made, any contract of management or managing agency is determined, though without prejudice to the managing agent's right to recover any money on account of the premature contract of management.

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In England, the principle applicable to the case of a servant or Manager whose services are determined by an order of winding up was applied to the case of a Managing Director. [See *In re R. S. Newman Ltd.* (1)]. The view that winding up order operates as a wrongful dismissal of a Director was expressed in *Measures Brothers, Ltd. v. Measures* (2). In that case, it was held that the defendant Director was no longer bound by a covenant which restricted him from carrying on or being engaged or interested in the same business which the company was doing before winding up. In that case, the defendant had agreed with the plaintiff company, of which he was a Director, to hold office for seven years at a fixed salary and had covenanted that so long as he continued to hold office and for seven years after ceasing to hold such office he would not either solely or jointly with, or as Manager or agent for any other person or persons or company, directly or indirectly, carry on or be engaged or interested in any business that would compete with that carried on by the company. A Receiver and Manager was afterwards appointed in a debenture-holders' action and a compulsory winding up order was made against the company. The Receiver and Manager having given notice to the defendant that his services would no longer be required and ceased to pay his salary, the defendant commenced to carry on business on his own account. In an action, *inter alia*, to restrain him from carrying on a business in competition with the company in breach of his covenant, it was held that the winding up order operated as a wrongful dismissal of the defendant, and that applying the principle of *General Bill Posting Co. v. Atkinson* (3), he was no longer bound by the restrictive covenant. It would thus appear that the consequences of a winding up order is that there is, in effect a dismissal of the Directors and Managing Directors. The winding up order, therefore, in the present case, had the effect of dismissing Sri Jwala Prasad from his office of Managing Director ; (in the contract he is referred to as

(1) L.R. [1916] 2 Ch. 309.

(2) L.R. [1910] 1 Ch. 336.

(3) L.R. [1909] A.C. 118.

the Chairman of the company, but it is clear that his position was that of a Managing Director in view of Articles 100 and 101 of the Articles of Association and in view of clause 3 of the agreement, dated the 25th of July, 1938). Now if Sri Jwala Prasad was not responsible for bringing about the state of affairs which led to the company eventually going into liquidation, then this dismissal would be a wrongful dismissal and, in such a case, it would have to be seen what compensation Sri Jwala Prasad is entitled to. It was, however, submitted that the contract between Sri Jwala Prasad and the company became void for frustration. So far as India is concerned, the doctrine of frustration of a contract is embodied in sections 56 and 32 of the Indian Contract Act. Section 56 thereof runs as follows :

"An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful . . ."

It will be observed that this section clearly indicates that the act must become impossible or unlawful by reason of some event which the promisor could not prevent. This section has been recently interpreted and explained by their Lordships of the Supreme Court in *Satyabrata Ghose v. Mungneeram Bangur & Co.* (1). Their Lordships of the Supreme Court approved of the view of the Nagpur High Court in *Kesari Chand v. Governor General in Council* (2) to the effect that "the doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances *beyond the control of the parties*". The present winding up order was made upon the petition of a creditor because the Bank was not able to pay its debt. It was, therefore, made because of a default by the Bank in paying up the petitioning creditor and not on account of any circumstance which was beyond the control of

(1) A. I. R. 1954 S. C. 44.

(2) I. L. R. [1949] Nag. 718.

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the Bank. The Bank has a separate juristic entity from that of Sri Jwala Prasad, the Chairman, or the other Directors of the company, though ultimately it may be that it was by virtue of the mismanagement by the Chairman or the Directors that the Bank was not able to pay its debts. In the eye of law the default which led to the winding up order was a default by the Bank (the promisor). Section 56 of the Indian Contract Act, in my view, cannot apply to cases of non-performance of contracts due to events happening because of a default of the contracting party itself [see *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.* (1)]. The other limb of the law of frustration, so far as India is concerned, is to be found in section 32 of the Indian Contract Act. That section runs as under :

“Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void”.

There is in the contract under consideration between the Bank and Sri Jwala Prasad no express term that in the contingency of the Bank ceasing to do business or going into liquidation, the contract of service between Sri Jwala Prasad and the Bank would become void or unenforceable, but under section 9 of the Indian Contract Act, a promise may be express or implied. I have considered whether I could imply a term in the contract between the Bank and Sri Jwala Prasad according to which the Bank would be relieved of the liability to employ Sri Jwala Prasad and to pay his salary in the event of the Bank ceasing to do business or being liquidated and I have come to the conclusion that I could not imply this term. It would not be proper to imply a term of this nature because, in my view, neither of these two contingencies could possibly have been in the minds of the parties and it would be unreasonable to suggest that at the very inception of the new banking

(1) A. I. R. 1935 P.C. 128, 130.

company, parties must have contemplated a failure of the banking business or the eventuality of a winding up order being made. In this connexion it is, I think, pertinent to refer to the case of *Fowler v. Commercial Timber Co.* (1). In that case, by an agreement in writing made between the plaintiff and the defendant company, the plaintiff was appointed Managing Director of that company for a term of $5\frac{1}{4}$ years at a fixed salary. Before the expiration of that period the company passed a resolution, which was assented to by the plaintiff, for the voluntary winding up of the company on the ground that by reason of its liabilities it could not continue its business. The plaintiff thereupon brought an action claiming damages for repudiation of the agreement. It was held that a term could not be implied in the agreement that if the company should be wound up voluntarily and the plaintiff should vote for that course being adopted, his employment should cease so as to disentitle him to damage for breach of the agreement. The plaintiff was, therefore, held entitled to damages for breach of the agreement. My conclusion is that I should not read an implied term in the contract between the Bank and Sri Jwala Prasad as is clearly indicated by the decision in the above case. It is a decision of the court of appeal in England. It is not necessary for me to elaborate upon the doctrine of frustration, but so far as India is concerned, the doctrine is embodied either in section 56 or section 32 of the Indian Contract Act and before a contract can be held to be void and the parties relieved thereunder, one or the other of these sections must become applicable. My conclusion, therefore, is that the contract has not become void because of the banking company going into liquidation. I have already indicated that Sri Jwala Prasad must be deemed to have been dismissed from the office of the Chairman (Managing Director) of the Bank. In these circumstances, he could enforce the contract. If, however, he is responsible for bringing about the ultimate state of affairs which led to the stoppage of the company's business and led to the company not being able to pay its just dues

(1) L. R. [1930] 2 K. B. 1.

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which caused the winding up of the company, then he would have no right to any compensation under the contract because his dismissal, in such a case, would be because of his own fault. It is true that under the contract, it is only by a special procedure that the services of Sri Jwala Prasad can be terminated. The provision made in the contract is that he is to be found guilty of fraud or gross mismanagement of his duties as Chairman by a majority of three-fourths of the votes of the shareholders present at an extraordinary General Meeting called for the purpose. It was not necessary or possible to terminate his services in terms of the contract because these came to an end in consequence of the winding up order itself. It has now only to be determined whether Sri Jwala Prasad so conducted himself that he could be found guilty of gross mismanagement of his duties. That part of the enquiry has now to be made by the court which is in custody of the entire property and on which the duty must devolve. Mr. Justice AGARWALA has, in his order, indicated that such an enquiry should be made in the present misfeasance proceedings or later by the learned Company Judge. A broader enquiry than a misfeasance enquiry may be necessary to determine whether Sri Jwala Prasad was also guilty of mismanagement of his duties and was ultimately responsible for bringing about this banking company to an end. If the result of such enquiry is that Sri Jwala Prasad is not at fault, then, in my view, he would be entitled to his salary on the basis proposed by Mr. Justice AGARWALA. His view was that justice, equity and good conscience dictated that Sri Jwala Prasad should be paid half the amount which would be found to be the present value of the appellant's claim and that the present value of the appellant's claim should be determined by the learned Company Judge. Apparently, Mr. Justice AGARWALA meant to take the 1st of November, 1950, as the date with reference to which the present value of the appellant's claim was to be worked out. My reply, therefore, to the question formulated for answer is that—
 "Sri Jwala Prasad is not absolutely or unconditionally entitled to claim his salary from

the date the Liquidators took charge of the company to the date when the period of twenty years in his contract with the company will expire, but he would only be entitled to it in terms of the order proposed by Mr. Justice AGARWALA".

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The reference is answered accordingly. Let the papers be laid before the Bench concerned along with this judgment.

By the Court—Having regard to the order of the third Judge, the appeal is allowed in part and the order of the learned Company Judge is modified and it is directed that in addition to the claim already granted by the Official Liquidators and by the learned Company Judge, the appellant is entitled to half the amount, which will be ascertained by the learned Company Judge, of the salary due to the appellant from 1st November, 1950, to 30th June, 1958, provided the appellant is not found guilty of any misconduct in the affairs of the Bank, which misconduct led to the winding up of the company. The question whether the appellant is guilty or not of any misconduct in the affairs of the Bank, which misconduct led to the winding up may be determined in the misfeasance proceedings which are pending. If not determined in those proceedings, it will be determined by the learned Company Judge in separate proceedings.

The parties will get and pay costs of this appeal according to their success and failure.

Appeal partly allowed.

CIVIL MISCELLANEOUS

Before Mr. Justice Bhargava and Mr. Justice Chaturvedi

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Constitution of India, 1950, Art. 226—*Writ of certiorari—Order of Appellate Tribunal abolished and gone outside jurisdiction—Award of Adjudicator—No jurisdiction.*

No writ of certiorari can be issued to quash the decision of the Labour Appellate Tribunal which has been abolished and has gone outside the jurisdiction of the High Court or the Award given by the Adjudicator in the case.

Case-law discussed.

Civil Miscellaneous Writ no. 1016 of 1955.

The facts appear in the judgment.

K. M. Sinha for the applicant.

S. N. Dwivedi for the opposite parties.

The judgment of the Court was delivered by—

BHARGAVA, J. :—By this petition under Article 226 of the Constitution, the petitioner, Messrs. E. Sefton & Co., Mirzapur, have prayed for the issue of an order, direction or writ in the nature of certiorari to be issued to opposite parties, the Government of the State of Uttar Pradesh, the Regional Conciliation Officer, Allahabad, and the Labour Appellate Tribunal of India, Lucknow, to produce before this Court the notification, dated 27th December, 1954, the award dated 19th June, 1955, and the decision dated 26th September, 1955, and the further prayer is that on production thereof the notification, the award and the decision, referred to above, be quashed.

Two persons, Aditya Prasad and Tasadduq Husain, were employed by the petitioner company, having been taken into service on the 29th October, 1948, and 26th

February, 1951, respectively. They were retrenched on the 5th April, 1954, and 8th April, 1954, respectively. It is alleged that, at the time of this retrenchment, none of them made any protest, nor was any demand made by them against the company. Further, it is alleged that even the opposite party no. 1, the Textile Mill Mazdoor Union, Mirzapur, at that stage made no protest and made no demand in respect of that retrenchment; on the other hand, on their applications, dated 6th April, 1954, and 10th April, 1954, respectively, these two persons were given temporary jobs by the petitioner company for the period of three months as ice clerks in subsidiary business. This temporary employment of these two persons was terminated on the 13th July, 1954, and 17th July, 1954, respectively. It is stated that even at this stage there was no protest or demand on their behalf. In the same month of July, 1954, the petitioner company received a notice from the Regional Conciliation Officer, Allahabad, stating that the latter had received an application from opposite party no. 1, the textile Mill Mazdoor Union, Mirzapur, with a prayer that a Conciliation Board be constituted in accordance with G. O. no. V-615(u)/XIII(LL)-51, dated 15th March, 1951, to investigate into the matter referred to in that application. It appears that the matter referred to in that application included the retrenchment of these two persons, Aditya Prasad and Tasadduq Husain, in the month of April, 1954. In the notice, the petitioner company was directed to nominate its representative who was to sit on the Board of Conciliation, and 20th July, 1955, was fixed as the date on which the company was to put in appearance for the investigation of that matter. Besides this matter relating to these two persons, one more matter was referred to the Conciliation Officer by the opposite party no. 1, the Textile Mill Mazdoor Union, Mirzapur, and that raised the question of payment of four months' wages as bonus to the workmen for the year 1952-53. The petitioner company contended that there was no dispute between the company and its workmen at all and on that account refused to submit to the conciliation proceedings. The representative of the company, who

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appeared before the Regional Conciliation Officer in response to the notice issued, explained the point of view of the petitioner company to that Officer. Thereupon the Regional Conciliation Officer held that the conciliation proceedings could not succeed and made a report to the Government of the State of Uttar Pradesh. Thereupon, the State Government issued a notification, dated the 27th December, 1954, which is one of the orders impugned in this writ petition. In this notification, it was stated that the Governor was satisfied that an industrial dispute existed with respect to the matters specified in the notification and that, in the opinion of the Governor, it was necessary for the maintenance of public order and for maintaining employment, to refer the said dispute to the Regional Conciliation Officer, Sri J. N. Srivastava, for adjudication. This reference to the Regional Conciliation Officer for adjudication was purported to be made by the State Government in exercise of the powers conferred by sections 3, 4 and 8 of the U. P. Industrial Disputes Act, 1947, and in pursuance of the provisions of clause 11 of G. O., dated 14th July, 1954, which had been issued under the U. P. Industrial Disputes Act by the State Government and had been notified in the official *Gazette*. The matters referred for adjudication were : “(1) Whether the employers have wrongfully or unjustifiably terminated the services of Aditya Prasad and Tasadduq Husain. If so, to what relief are they entitled ? and (2) Whether the employers should be required to pay bonus to their workmen for the year 1952-53. If so, at what rate, and with details ?” The Regional Conciliation Officer, who was appointed as the Adjudicator, gave his award on the 19th June, 1955. By this award the claim for restoration in service of Aditya Prasad and Tassadduq Husain was rejected, but they were allowed retrenchment compensation. The award also directed payment of bonus to the workmen for the year 1952-53. This award dated 19th June, 1955, is the second order impugned in this writ petition. Two appeals were filed against this award before the Labour Appellate Tribunal of India, Lucknow Bench. The two appeals were decided

together. The result of the two decisions of the Labour Appellate Tribunal was that, in place of retrenchment compensation, a direction was issued for reinstatement of Aditya Prasad and Tasadduq Husain. In addition, the payment of bonus to the workmen for the year 1952-53, was also upheld. This appellate decision of the Tribunal, dated the 26th September, 1955, is the third order impugned in this writ petition. The petition was filed in this Court on the 20th October, 1955. The Court directed issue of notices by registered post and also passed an interim order. It appears that subsequently the Labour Appellate Tribunal of India was abolished and all the records were also transferred to Bombay. This has been brought to the notice of the Court by a subsequent application supported by an affidavit presented on behalf of the opposite party no. 1, the Textile Mill Mazdoor Union, Mirzapur. The fact that the Labour Appellate Tribunal of India, Lucknow Bench, has been abolished and that its record has been transferred to Bombay are not denied on behalf of the petitioner. On these facts, a preliminary objection was raised on behalf of the opposite parties that this Court had no jurisdiction now to issue any writ of certiorari for quashing either the notification or the two orders sought to be quashed in the prayer in this petition.

There is, of course, no doubt, as contended on behalf of the petitioner, that the Regional Conciliation Officer, who gave the award on the 19th June, 1955, still continues to exist and exercise jurisdiction within the jurisdiction of this Court, but the award given by him merged in the appellate decision of the Labour Appellate Tribunal and that award by itself cannot be quashed without quashing the decision of the Labour Appellate Tribunal also. This proposition is supported by a decision of a Full Bench of this Court in *Azmat Ullah v. Custodian, Evacuee Property, U. P., Lucknow* (1). Learned counsel for the petitioner urged that the decision of the Full Bench cited above could not be applied in the present case on two grounds: The first point urged by learned

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counsel was that an examination of the provisions of the U. P. Industrial Disputes Act, 1947, and the Industrial Disputes Appellate Tribunal Act, 1950, would show that, according to the provisions of the two laws, the legal position that comes into existence is that the decision of the Appellate Tribunal merges with the award of the Adjudicator or the Industrial Tribunal and has thereafter to be treated as an award of the Adjudicator or Industrial Tribunal so that what ceases to exist by merger is not the award of an Industrial Tribunal or Adjudicator but the decision of the Labour Appellate Tribunal itself. The second point urged by learned counsel was that in any case a part of the record of the Labour Appellate Tribunal, Lucknow Bench, was still within the jurisdiction of this Court and consequently this Court had not lost jurisdiction to quash the decision of that Tribunal or thereafter to quash the award given by the Adjudicator.

The first point was urged by learned counsel on the basis of section 16 of the Industrial Disputes (Appellate Tribunal) Act, 1950, which is to the following effect :

- “16. *Effect of decision of the Appellate Tribunal*—Where an appeal from any award or decision of an industrial tribunal, the Appellate Tribunal modifies in any manner whatsoever that award or decision, the decision of the Appellate Tribunal shall, when it becomes enforceable under section 15, be deemed to be substituted for that award or decision of the Industrial Tribunal and shall have effect for all purposes in the same manner and in accordance with the same law under which the award or decision of the Industrial Tribunal was made as if the Industrial Tribunal made the award or decision as modified by the decision of the Appellate Tribunal.”

Learned counsel interpreted this section to mean that, after the Appellate Tribunal had given a decision in any manner modifying the award of the Adjudicator, that

decision of the Appellate Tribunal had to be deemed to be substituted for the award and the effect of this substitution was that the decision became the award of the Industrial Tribunal. [It may here be clarified that the words "Industrial Tribunal" used in the Industrial Disputes (Appellate Tribunal) Act, 1950, includes an Adjudicator appointed under the U. P. Industrial Disputes Act, 1947.] In order to strengthen his argument, learned counsel referred to the further provision laying down that the decision of the Appellate Tribunal was to have effect for all purposes in the same manner and in accordance with the same law under which the award of the Industrial Tribunal was made as if the Industrial Tribunal made the award or decision as modified by the decision of the Appellate Tribunal. In this connexion, he drew our attention to the provisions of section 6 of the U. P. Industrial Disputes Act, 1947, under which an award of an Adjudicator has to be submitted to the State Government and thereafter the State Government can enforce it in the manner laid down in that provision of law.

In our opinion, that is not the correct interpretation of the position brought about by these two enactments in question. What section 16 of the Industrial Disputes (Appellate Tribunal) Act, 1950, lays down is that on modification of the award, the decision of the Tribunal has to be deemed to be substituted for the award. The use of the expression "deemed to be substituted" clearly implies that the result of the decision of the Appellate Tribunal is that the award of the Industrial Tribunal for all purposes becomes non-existent and its place is taken by the decision of the Appellate Tribunal. Consequently, what becomes non-existent is the award of the Industrial Tribunal and what thereafter exists is the decision of the Appellate Tribunal. It is not merely a case where the decision or the award of the subordinate judicial or quasi-judicial authority merges with the decision of the superior authority but the law actually brings about the fiction that the decision of the subordinate Tribunal or authority ceases to exist and thereafter the decision of the superior authority remains in

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existence incorporating in it the unmodified portion of the award or decision of the subordinate Tribunal or authority. How the further action on that decision of the Labour Appellate Tribunal has to be taken is also indicated by the provisions of the Industrial Disputes (Appellate Tribunal) Act itself. Under section 9 (9) of that Act, the Appellate Tribunal is required to send a copy of the decision to the Industrial Tribunal concerned and another copy to the appropriate Government, as soon as practicable, within one week from the date of the decision. The decision of the Tribunal has, therefore, to be communicated to the State Government under section 9 (9) of that Act. It is not to be communicated in the manner in which an award has to be submitted by the Adjudicator under section 6 (1) of the U. P. Industrial Disputes Act, 1947. After a copy of the decision of the Appellate Tribunal has reached the State Government, of course, the State Government has to enforce that decision in exactly the same manner and in accordance with the same law under which the award of the Adjudicator had been made, viz., the U. P. Industrial Disputes Act, 1947. The provisions of these two enactments thus make it clear that the decision of the Appellate Tribunal remains in existence and has to be enforced as a decision of that Tribunal, and, consequently, if that decision of the Appellate Tribunal cannot be quashed by issue of a writ of certiorari by this Court on the ground that the Tribunal has ceased to exist and its record has gone out of the jurisdiction of the Court, no writ of certiorari can be issued even for the purpose of quashing the award of the Adjudicator, whether it remains as it was originally given by the Adjudicator or as modified by the decision of the Appellate Tribunal. In cases where the decision of the Appellate Tribunal does not in any manner modify the award of the Adjudicator, section 16 of the Industrial Disputes (Appellate Tribunal) Act of 1950 may not apply as contended by learned counsel for the petitioner. But, in such a case, the principle of merger of the decision of the subordinate Tribunal with the decision of the superior Tribunal, laid down in the Full Bench case cited above, would

apply. Since in this case there is a clear assertion that the Labour Appellate Tribunal of Lucknow Bench has been abolished and the records of the case, in which the decision of the Appellate Tribunal, which is impugned in this petition, was given, has gone to Bombay outside the jurisdiction of this Court, no writ of certiorari can be issued to quash that decision of the Labour Appellate Tribunal or the award given by the Adjudicator.

The second point, which was urged by learned counsel, to the effect that at least a part of the record of the Appellate Tribunal is still within the jurisdiction of the Court, was based on the provisions of section 6 (1) of the U. P. Industrial Disputes Act, 1947. According to learned counsel, in order that the decision of the Labour Appellate Tribunal should be enforced in accordance with the provisions of the U. P. Industrial Disputes Act, 1947, as laid down by section 16 of the Industrial Disputes (Appellate Tribunal) Act, 1950, the original decision must have been submitted by the appellate Tribunal to the State Government in accordance with section 6 (1) of the U. P. Industrial Disputes Act, 1947, so that the original decision must still be within the jurisdiction of this Court and it can, therefore, be quashed by issue of a writ of certiorari. We have already indicated above that the procedure that has to be followed for enforcement of a decision of the Labour Appellate Tribunal does not involve compliance with section 6 (1) of the U. P. Industrial Disputes Act. That provision is confined to the submission of the award by an Adjudicator to the State Government. In the case of a decision of the Labour Appellate Tribunal, there is a separate and specific provision in section 9 (9) of the Industrial Dispute (Appellate Tribunal) Act, 1950, which indicates how the decision of the Tribunal is to be communicated so that subsequently it can be enforced. The method of communication that has been prescribed is that a copy of the decision is to be sent to the Adjudicator and another copy to the State Government. The State Government has to take proceedings for enforcement of the decision of the Labour Appellate Tribunal on the basis of the copy received by it.

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under section 9 (9) of the Industrial Disputes (Appellate Tribunal) Act, 1950. The law does not thus require that the original decision must be sent to the State Government. It would form part of the record of the case in which that decision is given by the Appellate Tribunal and we have before us a definite assertion in the supplementary counter-affidavit filed on behalf of the opposite party no. 1 that the record of that case with the original decision of the Appellate Tribunal has been transferred to Bombay and is no longer within the jurisdiction of the Court. The existence of the copy of the decision of the Appellate Tribunal which might have been received by the State Government under section 9 (9) of the Industrial Disputes (Appellate Tribunal) Act, 1951, cannot be said to be the record in which the decision was given and against which alone a writ of certiorari can be directed. That is a mere copy of the decision sent in order that further action may be taken by the appropriate authority on it. The existence of such a copy of the decision within the jurisdiction of the Court does not entitle the Court to quash the decision itself which forms part of the record at present in Bombay and outside the jurisdiction of this Court. Consequently, in this case the preliminary objection, in so far as it relates to the prayer of the petitioner company for quashing the award, dated 19th June, 1955, and the decision of the Labour Appellate Tribunal, dated 26th September, 1955, must prevail and the petition to that extent must be rejected.

So far as the notification, dated 27th December, 1954, is concerned, it did not incorporate in it any decision or determination by any judicial or quasi-judicial authority. It was a notification issued by the Government of the State of Uttar Pradesh in exercise of its administrative and executive power conferred on it by section 3 of the U. P. Industrial Disputes Act, 1947. No writ of *certiorari* can be issued for quashing such a notification, as that writ is confined in its scope to quashing of orders or decisions of judicial or quasi-judicial Tribunals only. In view of these circumstances, learned counsel for the petitioner urged that this Court should issue some

other appropriate order or direction or writ by virtue of which the action that is now being taken in pursuance of this notification, may be restrained. This prayer was sought on the contention that that notification was void and not in accordance with any law, so that any action taken in pursuance of it could be restrained by this Court by issuing an appropriate order, writ or direction. It was further urged that the fact that, in pursuance of that notification, an award had been given by an Adjudicator and that award had been substituted by a decision of the Labour Appellate Tribunal, Lucknow Bench, could not stand in the way of this Court exercising the powers of restraining further action being taken in pursuance of that notification, because if that notification was void and against law, the Adjudicator and the Labour Appellate Tribunal of India in fact got no jurisdiction *ab initio* to adjudicate upon or give any decision on the disputes referred by the State Government by this notification so that the award and the decision of the Tribunal could be ignored as altogether void. Briefly put, the contention was that, if any judicial or quasi-judicial Tribunal exercises jurisdiction and the conferment of that jurisdiction is *ab initio* void, there is no necessity for issue of any writ of certiorari to quash the decision of the Tribunal and the Court would be competent to issue appropriate directions and orders completely ignoring the effect of that decision. This proposition was contested on behalf of the opposite parties, but it is supported by a Division Bench decision of this Court in *Moinuddin v. Director of Military Lands and Cantonments, Eastern Command* (1). We may first mention that the Full Bench in the case of *Azmat Ullah v. Custodian, Evacuee Property, Lucknow* (2), cited above, when dealing with the jurisdiction of the Court to issue a writ of certiorari against the Custodian General, New Delhi, had expressed no opinion on the question whether the Court would have been competent to issue a writ of certiorari if the Custodian General had had no jurisdiction at all to make the order

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(1) I. L. R. [1957] 2 All, 302.

(2) 1955 A. I. J. 521.

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in exercise of his revisional powers under section 27 of the Evacuee Property Act. In that case occasion had not arisen to lay down the proposition that, if the judicial or quasi-judicial tribunal had *ab initio* no jurisdiction at all, its order could or could not be ignored by the Court when issuing any order, direction or writ against a subordinate judicial or quasi-judicial tribunal or against public authorities seeking to carry out those orders. The point directly arose and was considered by a Division Bench in the case of *Moinuddin v. Dy. Director of Military Lands and Cantonments, Eastern Command* (1), mentioned above. In these circumstances, we proceed to consider whether the order, dated 27th December, 1954, issued by the Government of the State of Uttar Pradesh, was or was not a valid order, and whether it did or did not confer any jurisdiction on the Adjudicator and the Labour Appellate Tribunal of India to deal with the dispute, which was referred for adjudication by that order.

The validity of the order of the 27th December, 1954, was challenged on behalf of the petitioner company on two grounds: One ground was that the petitioner company was carrying on industry mentioned in item no. 10 of the First Schedule to the Industries (Development and Regulations) Act, 1951, as amended by the Industries Development and Regulation Act, 1953, so that the U. P. Industrial Disputes Act, 1947, was not applicable to any disputes in this industry. In sub-section 1 of section 2 of the U. P. Industrial Disputes Act, the expression "Industrial Dispute" is defined as having the same meaning as assigned to it in section 2 of the Industrial Disputes Act, 1947 (Central Act XIV of 1947) (hereinafter referred as the "Central Industrial Disputes" Act), subject to the modification that "industrial disputes" shall be construed not to include a dispute concerning any industry specified in sub-section (i) of clause (a) of section 2 of the Central Industrial Disputes Act, 1947. Section 2 (1) (a) of the Central Industrial

(1) I. L. R. [1957] 2 All. 302.

Disputes Act, as amended by the Industrial (Development and Regulation) Amendment Act, 1953, reads as follows :

“In this Act, unless there is anything repugnant in the subject or context,—

(a) “appropriate Government” means—

(i) in relation to any industrial dispute concerning any industry carried on by or under the authority of the Central Government or by a railway company or concerning any such controlled industry as may be specified in this behalf by the Central Government, or in relation to an industrial dispute concerning a banking or an insurance company, a mine, oil field or a major port, the Central Government, and

(ii) in relation to any other industrial dispute, the Provincial Government.”

The contention on behalf of the petitioner company is that the industry carried on by the petitioner company is a controlled industry which has been specified in this behalf by the Central Government within the meaning of this expression as used in section 2 (a) (i) of the Central Industrial Disputes Act. That the industry carried on by the petitioner company is a controlled industry cannot be doubted. In section 2 of the Industries Development and Regulation Act, 1951, the Legislature laid down a declaration in the following words :

“It is hereby declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule.”

By the Industries (Development and Regulation) Amendment Act, 1953, item 10 of the First Schedule was altered so as to include in clause (c) “textiles made of wool including woollen yarn, hosiery, carpets and druggest”. The industry carried on by the petitioner company is that of manufacturing woollen blankets,

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which are textiles made of wool. Consequently, the industry of the petitioner company is an industry which is covered by the declaration contained in section 2 of the Industries Development Regulation Act, 1951, as amended by the Amendment Act of 1953. Under clause (ee) of section 2 of the Central Industrial Disputes Act, a controlled industry has been defined to mean any industry the control of which by the Union has been declared by any Central Act to be expedient in the public interest. Since the industry of the petitioner company has been included in the First Schedule to the Industries (Development and Regulation) Act, 1951, and by section 19 of the Amendment Act of 1953, it is clear that it is an industry which comes within the definition of "controlled industry" as defined in clause (ee) of section 2 of the Central Industrial Disputes Act. The question, however, still remains whether the mere fact that the industry of the petitioner company is a controlled industry is sufficient to make section 2 (a) (i) of the Central Industrial Disputes Act applicable to it, so as to make the Central Government the appropriate Government for this industry. The relevant clause of section 2 (a) (i) which has been relied upon may now be separated from the rest of the provisions and for convenience reproduced as "any such controlled industry as may be specified in this behalf by the Central Government". This expression includes within it two requirements: Firstly, in order that the Central Government should be the appropriate Government, the industry should be a controlled industry and, secondly, it should be specified in this behalf by the Central Government. The first requirement of the industry being a controlled industry is clearly satisfied by the industry of the petitioner company as has been held above. The main argument has centred round the other requirement that the industry must be specified in this behalf by the Central Government. On behalf of the petitioner company, no notification or Government order of the Central Government has been brought to our notice in which there might have been a specification of this particular industry as an industry specified for the purposes of section 2 (a) (i)

of the Central Industrial Disputes Act. On the other hand, on behalf of the opposite parties, our attention has been drawn to a notification issued by the Central Government, Ministry of Labour, on the 27th April, 1955, under which the controlled industries engaged in the production or use of certain minerals mentioned in the schedule annexed to that notification were specified by the Central Government for the purposes of sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act. The controlled industries mentioned in that notification are not covered by the first schedule to the Industries (Development and Regulation) Act, 1951, as amended in 1953. The controlled industries mentioned in that notification came within the purview of section 2 of the Atomic Energy Act, 1948. Under this provision of law also, the Legislature had laid down a declaration that "it was expedient in the public interest that the Government should take under its control the development of (a) any industry connected with the production or use of atomic energy and (b) any mineral which is or may be used for the production or use of atomic energy or research into matters connected therewith".

The notification, dated 27th April, 1955, says that the minerals noted in the schedule annexed to that notification had been declared by the Government of India in the Ministry of Natural Resources and Scientific Research to be minerals from which in the opinion of the Central Government any of the prescribed substances defined in clause (d) of section 3 of the Atomic Energy Act, 1948, were or might be obtained. Consequently, the industries which were specified for the purposes by sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act were industries covered by the declaration of the Legislature contained in section 2 of the Atomic Energy Act, 1948, and were controlled industries as defined in clause (ee) of section 2 of the Central Industrial Disputes Act. This shows that the Central Government, in order that it should be the appropriate Government for these controlled industries, did actually issue a special notification specifying various industries

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for the purposes of sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act. No such notification appears to have been issued with respect to the industry carried on by the petitioner company. Learned counsel for the petitioner in these circumstances urged that there was no necessity for a separate specification for the purposes of sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act in regard to industries which were already contained in the First Schedule to the Industries (Development and Regulation) Act as amended in 1953, and that the specification automatically came into existence whenever an industry was either registered under section 10 or granted a licence under section 11 of the Industries (Development and Regulation) Act, 1951, as amended in 1953. In fact what he urged was that such registration or licensing amounted to the specification envisaged by sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act. This contention cannot be accepted. Sections 10 and 11 of the Industries (Development and Regulation) Act, 1950, as amended in 1953, deal with "industrial undertakings" and not with an "industry" as such. In clause (d) of section 3 of the Industries (Development and Regulation) Act, 1951, the words "Industrial undertaking" were defined to mean any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority, including Government. In clause (i) of the same section a "scheduled industry" was defined to mean any of the industries specified in the First Schedule. The words "Industrial undertaking" were, therefore, given by the Act a meaning which was separate and distinct from the word "Industry". The word "Industry" was envisaged as covering all kinds of undertakings engaged in working on materials mentioned in the first schedule. If the manufacture or production of iron and steel was carried on anywhere under any circumstance, that would be an industry engaged in the manufacture and production of iron and steel. It would not, however, necessarily be an industrial undertaking. To be an industrial undertaking, the work of manufacture or production

should be carried on in one or more factories by any person or authority including Government. Clearly, all industrial undertakings engaged in the manufacture or production of any particular item mentioned in the First Schedule would be carrying the industry mentioned in that schedule. But a single undertaking of that nature would not be synonymous with that industry. Sections 10 and 11 of the Industries (Development and Regulation) Act, 1951, required the registration or licensing of an industrial undertaking engaged in any industry and not the registration or licensing of the industry as a whole. Registration or licensing of an undertaking carrying on a particular industry could not, therefore, amount to specification of such industry for any purpose and particularly for a purpose which was not mentioned in the Industrial Development and Regulation Act, 1951, which provided for the registration or licensing. In the instant case, we are concerned with the specification not for the purpose of Industries (Development and Regulation) Act, 1951, but for the purpose of the Central Industrial Disputes Act. That specification was to be not only in respect of industries covered by section 2 of the Industries (Development and Regulation) Act, 1951, but also in respect of any other industry which may be covered by a similar provision in any other law, an example of which has already been cited above with reference to Atomic Energy Act of 1948. Any specification for the purposes of sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act, 1947, must be a specification which would apply for the purposes of that Act irrespective of the question whether the particular industry specified had become a controlled industry as a result of a declaration in one Central Act or in any other Central Act. In the Atomic Energy Act, 1948, the provisions differed very widely from the provisions made in the Industries (Development and Regulation) Act, 1951, and consequently registration and licensing under the latter Act are not comparable with the steps that have to be taken for controlling the industries covered by section 2 of the Atomic Energy Act, 1948. Yet, all such controlled industries whether covered by

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one Act or another Act, have to be specified for the purposes of sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act in the same manner. Such specification must, therefore, be a separate specification designed particularly to satisfy the requirements of sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act and so far as the industry of the petitioner company is concerned, there has been no such separate specification.

In support of his argument that the registration or licensing under sections 10 and 11 of the Industries (Development and Regulation) Act, 1951, should be held to be the specification envisaged in sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act, learned counsel drew our attention to the fact that the Central Industrial Disputes Act itself contains no provision prescribing the manner in which the specification was to be made and published. It is true, that, in a number of statutes, a direction is laid down as to the manner in which a particular order, direction, declaration, or specification must be notified by the authority making it and in the majority of the cases, the manner prescribed is by publication in the official *Gazette*. It, however, appears that, in the case of specification for purposes of sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act, the Legislature did not consider it necessary to lay down the manner of making and publishing the specification. When the manner of making and publishing the specification is not laid down in the Act itself, a reasonable inference would be that the specification must be made and published in such a manner that it would come to the notice of all the persons who would be concerned with or interested in the specification. The discretion appears to have been left to the Central Government to choose the appropriate manner of making the specification and giving publicity to it. Merely because the manner of making and publishing the specification is not laid down in the Central Industrial Disputes Act itself, a presumption cannot be raised that that manner must be laid down in some other law. The

specification under sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act has to be made in respect of controlled industries which are declared as such by any other special law. In such a case, it is not possible to hold that the registration and licensing in one special law must be deemed to be a specification for the purposes of the Central Industrial Disputes Act. It also appears that, in fact, when the Central Government did make such a specification with regard to certain industries declared to be controlled industries under the Atomic Energy Act, 1948, that specification was published in the official *Gazette*. No such specification has been made or published with regard to the industry carried on by the petitioner company, so that the industry of the petitioner company is not one for which the Central Government is the appropriate Government under sub-clause (i) of clause (a) of section 2 of the Central Industrial Disputes Act. Consequently, the Government of the State of Uttar Pradesh was the appropriate Government and the provisions of the U. P. Industrial Disputes Act could be applied to an industrial dispute arising in the industry of the petitioner company, so that the Government of Uttar Pradesh acted in exercise of the powers vested in it when it issued the notification, dated 27th December, 1954.

The second ground on which the validity of this notification was challenged on behalf of the petitioner company was that in fact it was not necessary to refer the industrial dispute for adjudication for one or more of the purposes mentioned in section 3 of the U. P. Industrial Disputes Act, 1947, so that the reference as a whole was void. The necessity of issuing the notification and making the reference were matters which under the law are to be determined by the subjective satisfaction of the Government of the State of Uttar Pradesh and it is not within the competence of this Court to see whether the satisfaction of the Government was or was not fully justified. The fact of the actual existence of the industrial dispute had also to be determined to the satisfaction of the State of Uttar Pradesh and the correctness of this satisfaction is also not open to question in courts. These

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principles have been laid down in several decisions of this Court, but it is sufficient for us in this case to refer to a decision of the Supreme Court which covers the point. That case is *State of Madras v. C. P. Sarathy* (1). The principle was further reiterated by the Supreme Court in the case of *Newspapers Ltd. v. The Industrial Tribunal* (2). In both these cases, the principle laid down was that the factual existence of the dispute and the necessity of making reference for adjudication for the purposes mentioned in the appropriate law cannot be challenged in courts. The courts are competent only to go into the question whether the dispute that was referred constituted an industrial dispute or not. In the instant case, it has not been urged that the dispute which was referred for adjudication by the notification dated 27th December, 1954, did not constitute an industrial dispute. All that was urged was that in fact there was no dispute at all. This point, as we have said earlier, cannot be gone into by this Court. We might, however, mention that facts disclosed to us show that Aditya Prasad and Tasadduq Husain were retrenched in the month of April, 1954, whereafter they got temporary employment which continued up to July, 1954. It was while they were under this temporary employment that the dispute was referred on their behalf by opposite party no. 1, the Textile Mill Mazdoor Union to the Regional Conciliation Officer. In the various affidavits filed, the exact date when the reference was made by the Union to the Regional Conciliation Officer has not been mentioned. We have only found in the award of the Adjudicator a mention that the dispute was referred by the Union to the Regional Conciliation Officer in the month of June, 1954. The contention on behalf of the petitioner company was that Aditya Prasad and Tasadduq Husain had lodged no protest and had made no demand either at the time of their retrenchment in April, 1954, or at the time of the termination of their temporary employment in July, 1954, and further that the Union also had not taken any steps to raise a dispute at those relevant times and consequently it must be held

(1) A. I. R. 1953 SC. 53.

(2) I. L. R. [1957] 2 All. 497.

that there was in fact no dispute at all. This contention fails because there is material on the record to show that the Union did take up the matter on behalf of these two persons to the Regional Conciliation Officer in the month of June, 1954, while those two persons were still under temporary employment of the petitioner company. The fact that no protest had been raised or demand made by these two persons when they were retrenched in April, 1954 and that they acted similarly when their temporary employment terminated in July, 1954, were certainly relevant considerations for arriving at the view whether a dispute did or did not exist. The fact that a reference had been made to the Regional Conciliation Officer in the matter of their retrenchment in the month of June, 1954, was another relevant consideration. These were the materials on the basis of which the Government of Uttar Pradesh had to form its opinion about the factual existence of the dispute. It cannot be said that the opinion formed by the Government of the State of Uttar Pradesh was in these circumstances a perverse or impossible opinion which had no relation to the existing facts. The factual existence of the dispute having been found by the State Government, it was again for the Government of the State of Uttar Pradesh to judge the expediency of making the reference. The existence of that expediency had been mentioned by the State Government in the notification itself and again we cannot sit in judgment over the opinion formed by the Government. All that we are competent to see is whether the dispute that was referred did or did not constitute an industrial dispute and satisfied the requirements of an industrial dispute as given in the U. P. Industrial Disputes Act, under which the reference was made. To be an industrial dispute it was not necessary that it should have related to the employment, non-employment or conditions of service of a workman. The definition of industrial dispute lays down two essential requirements. One requirement is that the dispute should be between an employer and another employer or between an employer and workmen or

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between workmen and workmen. The second requirement is that the dispute should be connected with the employment or non-employment or the terms of employment or the conditions of labour of any person. The dispute that was actually referred related to the retrenchment of Aditya Prasad and Tasadduq Husain which was clearly covered by the expression "non-employment of any person". The contention that the person whose non-employment should be the subject matter of the dispute must also be a workman, cannot be accepted. It does not appear to be necessary to give the reasons for this view in detail. One of the members of this Bench had occasion to consider this question in *Messrs. Prahlad Rai Oil Mills v. State of Uttar Pradesh* (1). It was held :

"The second requirement is that the dispute should be connected with the employment or non-employment or with the condition of labour of any person. It is significant that, in this part of the definition, the words used are 'any person' and not 'a workman'. It is clear that for a dispute to be an industrial dispute it is not necessary that it should be connected with the employment or non-employment or the terms of the employment or conditions of labour of a workman as long as the dispute is connected with the employment or non-employment, etc. 'of any person' it will be an industrial dispute provided, of course, the two parties to the dispute are either employers and employees, or employers and workmen or workmen and workmen."

A similar point arose before the other member of the Bench in *J. K. Cotton and Spinning and Weaving Mills Ltd., Kanpur v. The State of Uttar Pradesh* (2). In that case also, it was not held that the dispute must necessarily relate to the employment or non-employment of a workmen. The scope of the words "any person"

(1) Civil miscellaneous writ no. 603 of 1953, decided 23rd November, 1954.

(2) Civil miscellaneous writ no. 291 of 1955, decided on 25th July, 1955.

was, however, examined in greater detail and it was held that these words could not include a labourer working in a concern situate in a different country or situate in a completely different type of industry. The words have to be given a restricted meaning according to the context and the objects for which the Industrial Disputes Act had been enacted. The decision of the Bombay High Court in *Narendra Kumar v. A. I. I. Disputes Tribunal* (1) was referred to and the views expressed by the learned CHIEF JUSTICE of the Bombay High Court on this point were followed. It had been held by the learned CHIEF JUSTICE of the Bombay High Court that the words "any person" could only mean those persons in whom the workmen themselves were directly and substantially interested. If the workmen have no direct or substantial interest in the employment or non-employment of a person, then an industrial dispute could not arise with regard to such person. The judgment of the Supreme Court in the *Newspapers Ltd. v. The State Industrial Tribunal, U. P.* (2) also supports this view. In that case, the dispute in the reference related to the wrongful termination of the service of one individual Tajammul Husain, Lino Operator. In the notification issued by the U. P. Government referring the dispute under section 3 of the U. P. Industrial Disputes Act, there was a mention that a dispute existed between the employer and its workmen. Dealing with the notification, the Supreme Court held that the words used in the first part of the notification showed that the Government was labouring under the misapprehension that the dispute was between the employer on one hand and its workmen on the other which in fact it was not. Tajammul Husain could not be termed workmen (in plural), nor could the U. P. Working Journalists Union be called "his workmen", nor was there any indication that the individual dispute had got transformed into an "Industrial dispute". This view was expressed by the Supreme Court in the light of the fact that the U. P. Working Journalists Union which referred the dispute in the matter of Tajammul Husain's termination of

(1) A. I. R. 1953, Bom., 325.

(2) I. L. R. [1957] 2 All. 497.

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services was not a union of the workmen employed by the Newspapers Ltd. and was in fact situated in a different city. It was under these circumstances that the Supreme Court was of the view that the reference of the dispute by the State Government was incompetent as no dispute had been raised by workmen (plural) as had a direct interest in the dispute relating to the termination of the services of Tajammul Husain. In the present case, the dispute was brought before the Regional Conciliation Officer for the first time by the opposite party no. 1; the Textile Mill Mazdoor Union, Mirzapur. The name of the Union itself indicates that it is a union of workmen employed at Mirzapur and it was in that capacity that the Union made a reference of the dispute relating to the retrenchment of Aditya Prasad and Tasadduq Husain. It has not been alleged anywhere on behalf of the petitioner company that the Textile Mill Mazdoor Union, Mirzapur, was not competent to take the dispute on behalf of Aditya Prasad and Tasadduq Husain, presumably because they were themselves members of that Union or in any case, the Union did represent workmen employed by the petitioner company. It appears, even from the award given by the adjudicator, that at no stage was it contended before him that this Union was not competent to take up this dispute as an industrial dispute when it related to the alleged retrenchment of Aditya Prasad and Tasadduq Husain. There is only an indication in the counter-affidavit filed by Sri J. N. Srivastava, Regional Conciliation Officer, Allahabad, that very likely Aditya Prasad and Tasadduq Husain were members of this Union when he swore in respect of these persons that "the aforesaid employees and their Union has a right to raise their disputes even after their retrenchment". The description of opposite party no. 1, the Textile Mill Mazdoor Union, Mirzapur, as the Union of the employees Aditaya Prasad and Tasadduq Husain, points to the fact that they were members of this Union. The burden in this case where a petitioner company came to invoke the jurisdiction of the court of law was on that petitioner company to show that the Union was not competent to take up this dispute and that

their taking up the dispute did not amount to raising a dispute between an employer and workmen. They failed to do so whereas whatever material has been provided before us, indicates that the Union was interested directly in the dispute which arose as a result of the retrenchment of Aditya Prasad and Tasadduq Husain. Both the contentions raised by learned counsel for the petitioner company to challenge the validity of the notification, dated 27th December, 1954, therefore, fail and have to be rejected. That notification being valid, the Adjudicator who gave the award acted in exercise of competent jurisdiction vested in him to give the award on the dispute referred to him. The decision given by him thereafter came to be substituted by the decision of the Labour Appellate Tribunal of India (Lucknow Bench), and that Tribunal has ceased to exist within the jurisdiction of this Court, with the further circumstance that the records of the case are also outside the jurisdiction of this Court. Consequently, none of the three orders impugned by this writ petition are liable to be quashed.

The petition fails and is dismissed with costs. A sum of Rs.250 is assessed as costs payable to the opposite party no. 1 and the same amount is payable to the opposite parties nos. 2 to 4 as fees for counsel engaged by them.

Application dismissed.

APPELATE CIVIL

Before Mr. Justice Desai and Mr. Justice Beg

RICHPAL CHAND AND OTHERS (DEFENDANTS)

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Hindu Law—Widow, transfer by—Legal necessity—Recitals in deed of transfer—Lapse of time and presumption in favour of necessity—Surrender, essential ingredients of—Reversioner joining in transfer, effect of.

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R. S., owner of zamindari property was murdered on 20th January, 1895. His widow *J.*, along with *S. S.*, sole reversioner, sold to *G. C.* the entire property on 25th January, 1897, for Rs.20,000 to discharge debts amounting to Rs.11,500. The widow *J.* died on 5th October, 1932. *R. S.* and *B. S.*, the then reversioners, thereupon sued on 21st January, 1944, the descendants of *G. C.* for possession over the property and *mesne* profits, alleging that the sale was not supported by necessity and that *L. S.*, a reversioner existing, had not joined the said sale.

Held, (i) that there was legal necessity to justify alienation to raise Rs.11,500 only;

(ii) that the sale itself professed not to raise the entire consideration of Rs.20,000 for legal necessity;

(iii) that legal necessity cannot be presumed as a matter of law from lapse of time;

(iv) that mere recitals in the deed of alienation is not sufficient proof; but where direct evidence through lapse of time has disappeared, recital acquires importance and presumption should be allowed to fill in the gaps;

(v) that where the purchaser acts in good faith and after due enquiry and the sale is justified by necessity, he is under no obligation to enquire into the application of the money;

(vi) that if the property is such as cannot be sold in part, sale of the whole may be justified though legal necessity is for sale of only a part of it;

(vii) that *L. S.* was not alive on the date of sale and *S. S.* was the sole reversioner;

(viii) that surrender by a widow must logically be of the entire estate and in favour of the whole body of the next reversioners;

(ix) that the sole reversioner joining in the execution of a sale of the entire estate by a Hindu widow will, as in the instant case, confer absolute title upon the vendee regardless of the question of necessity;

(x) that in every other case, the question of legal necessity will arise, and the only effect of a reversioner joining the widow will be, if at all, to raise a rebuttable, non-conclusive, factual presumption of legal necessity;

(xi) that the suit must accordingly fail.

Case-law discussed.

First Appeal no. 58 of 1947 from a decree of *B. N. Lal*, Additional Civil Judge of Mathura, dated the 7th March, 1946, in Suit no. 6 of 1944.

The facts appear in the judgment.

G. S. Pathak, Gopal Behari, Jagadish Swarup and Krishna Sahai for the appellants.

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A. P. Gupta, Krishna Shanker and Satish Chandra for the respondents.

DESAI, J. :—This is a defendants' appeal from a decree of a Civil Judge for possession over zamindari property in village Shamo and some houses, past *mesne* profits amounting to Rs.3,400 and *pendente lite* and future *mesne* profits at Rs.1,100 per annum. The decree was made conditional upon the plaintiffs respondents' depositing Rs.3,600 within three months for payment to the appellants ; in default their suit was to stand dismissed with costs.

The property in dispute was admittedly owned by Dr. Ranjit Singh as his self-acquired property. He was murdered on 20th January, 1958, and was survived by his widow Janki Devi and at least one brother Sher Singh. He had one more brother, Lekhraj Singh, but when he died is a matter of serious controversy in the appeal. Sher Singh died in 1904 leaving his son Ram Sarup Singh, plaintiff respondent no. 3. Lekhraj Singh left a son Bharat Singh, who was plaintiff no. 1, but died during the pendency of the suit leaving his sons Richpal Singh and Jaipal Singh, plaintiffs respondents nos. 1 and 2. Janki Devi entered into possession of the property in dispute as a Hindu widow on the death of Ranjit Singh. On 25th January, 1897, she sold it for the ostensible consideration of Rs.20,000 to Gopal Chand, father of defendants appellants nos. 1 and 2. Sher Singh as the nearest reversioner joined in the execution of the sale deed. Gopal Chand entered into possession of the property. He transferred some of it to the other defendants, who are *pro forma* respondents in the appeal. Janki Devi, who will be referred to as the widow, died on 5th October, 1932. At the time of her death, Ram Sarup Singh and Bharat Singh were the nearest reversioners. On 21st January, 1944, they instituted the suit, giving rise to this appeal, to recover possession of the property

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in dispute alleging that the sale, not being for legal necessity, was not binding after the death of the widow and that they were entitled to possession of the property. They also challenged the consideration of the sale though they did not specify for how much actually the property was sold. They urged that the widow was *pardahnashin*, almost illiterate and unable to manage her affairs and that Sher Singh, though literate, was addicted to drugs and unable to manage his affairs. They contended that Sher Singh's consent to the sale by the widow could not raise any presumption of legal necessity, because he was too dependent upon her and was of weak intellect on account of the effect of drugs. They claimed not only possession of the property in dispute but also *mesne* profits for three years immediately preceding the institution of the suit *pendente lite* and future *mesne* profits.

The suit was contested by the appellants, who filed their written statement on 24th April, 1944. They did not admit the pedigree showing Lekhraj Singh as a brother of Ranjit Singh. They maintained that the sale was for Rs.20,000, out of which Rs.17,450 were paid in cash at the time of the registration and Rs.2,550 were paid earlier as earnest, that the sale was for legal necessity, that Sher Singh joined in the execution as the sole reversioner, by way of a family settlement and also in token of the existence of legal necessity, that he and the widow both were intelligent and literate persons, who fully understood what they were doing, and that the recitals in the sale deed disproved the existence of any person named Lekhraj Singh. As regards the other defendants, they alleged that they were not transferees but were mere licensees and were unnecessarily impleaded as defendants. On 25th July, 1944, the appellants' counsel made a statement under Order X. of the Code of Civil Procedure to the effect that the widow had to discharge debts amounting to Rs.11,500 due to Bholai Singh, Bishambhar Nath, Priya Lal, Chandi Prasad, Girwar and Chhunni Lal, that she required money to meet expenses of civil and criminal cases and that Ranjit Singh had (only) one brother Sher Singh.

The learned Civil Judge framed the following issues :

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- "1. What consideration, if any, actually passed for the sale and whether there was legal necessity for any portion of the same ? Was the whole consideration paid or only a part was paid ? Was the sale executed under undue influence and fraud as alleged in paras. 3 and 6 of the plaint. Does the sale bind the reversioners ?
2. Was Sher Singh the sole presumptive reversioner on the date of the sale or some more persons ; if it be held that Sher Singh was the sole nearest reversioner on the date of sale, what is the effect of his joining as co-executants ?
3. Whether any or both of the plaintiffs were reversioners of Janki Devi and entitled to succeed her to the estate of Ranjit Singh on her death ?
4. Is the claim barred by limitation ? When did Mst. Janki die ?
5. Is the claim barred by principle of estoppel ?
6. Whether Janki Devi and Sher Singh executed the sale after fully understanding the implications and whether did they possess sufficient intelligence to comprehend the transaction ?
7. To what relief, if any, are the plaintiffs or any of them entitled ?
8. Whether defendants nos. 3, 5 and 6 are subsequent transferees from defendants nos. 1 and 2 of the property in Schedule B, or are they in possession in their own rights ? Is the suit bad for rejoinder of defendant no. 6 ?
9. Is the claim against defendants nos. 3 to 6 barred by section 41, Transfer of Property Act ?"

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The parties led oral and documentary evidence. The plaintiffs examined Bharat Singh, Chiranji Lal, Chhattar Singh and Sohan Lal. The defendants, (that is, the appellants, the *pro forma* defendants respondents being left out of consideration in the rest of the judgment), examined Bankey Lal, Bishambhar Nath, Kallu, Ram Nath, Kailash Nath, Shyam Singh, Baldeo Behari and Nathu Ram. Bharat Singh, Chhattar Singh and Chiranji Lal deposed that Lekhraj was a brother of Ranjit Singh and died in 1906. Sohan Lal gave evidence about the means of Ranjit Singh and the widow suggesting that the latter had no necessity of alienating the property. Kallu, an attesting witness of the sale deed stated that tenants did not pay rent to the widow because many persons of the village were prosecuted for the murder of Ranjit Singh and there was a great famine. Ram Nath, who is distantly related to the defendants, stated that the sale was negotiated by Gauri Shanker, a lawyer of Agra and maternal uncle of the defendants, that at the instance of the defendants' father he had told Gauri Shanker to make proper enquiries about the legal necessity for the sale by the widow and that he had paid earnest of Rs.3,000 to him on behalf of the defendants' father. Bishambhar Nath deposed about a debt due to him from Ranjit Singh and about its payment by the widow two years after his death. Shiam Sunder gave evidence about some debt due to his father, Priya Lal, by Ranjit Singh ; his evidence about the existence of the debt and its repayment after Ranjit Singh's death is hearsay. Baldeo Behari Lal was a relation of Gauri Shanker, who died in 1924, and stated that at Gauri Shanker's instance he had enquired of Chandi Prasad and learnt from him that some money was due to him from Ranjit Singh or his widow and that Chandi Prasad died about 40 years ago. He did not explain how the defendants knew that Gauri Shanker had asked him to enquire from Chandi Prasad whether any money was due to him. Nathu Ram is the son of Girwar, who had zamindari in village Shamo in which the property in dispute is situated and deposed about the conditions prevailing in the village. He

stated that Ranjit Singh was murdered as he was returning from Shamo by some tenants of the village who bore enmity with him, that several persons were prosecuted for the murder, some of whom were hanged, that some persons absconded from the village on account of fear of prosecution and that the tenants did not pay any rent to the widow. He also deposed about loans taken by the widow through Sher Singh from Bhulai Singh and Girwar for meeting expenses of rent suits and other suits, of the prosecution of Ranjit Singh's murderer and of succession certificate and house hold expenses. Lastly, he deposed about repayment of the loans of Bhulai Singh and his father after the sale in dispute and about enquiries made by Gauri Shanker from Girwar and Bhulai Singh about the moneys due to them from the widow.

The learned Civil Judge came to the following findings :

The plaintiffs were the nearest reversioners of Ranjit Singh entitled to inherit his estate on the widow's death. She died on 5th October, 1932. The suit having been brought within twelve years of that date was not barred by time. She and Sher Singh executed the sale deed in question intelligently and without any undue influence or fraud. It was executed for Rs.17,400 ; no earnest of Rs.2,560 was paid. The defendants must have learnt that the widow was indebted to the extent of only Rs.8,500 and that out of the amount of Rs.8,500, only Rs.3,600 were due from the estate of Ranjit Singh, consequently the sale deed was executed for legal necessity to the extent of Rs.3,600 only and, therefore, does not bind the reversioners. Sher Singh was not the sole presumptive reversioner on the date of the sale ; his brother, Lekhraj Singh, was alive. The suit was not barred on account of any estoppel and did not suffer from any defect of misjoinder. The *pro forma* defendants were not subsequent transferees, but the claim against them was not barred by section 41, Transfer of Property Act. The plaintiffs were entitled to recover possession of the property in dispute after paying Rs.3,600 to the defendants and to a decree for Rs.3,400 on account of past

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The defendants in this appeal challenge the findings of the trial court that the widow had legal necessity for selling property in order to raise Rs.3,600 only, that there was no legal necessity for transferring the entire estate, and that Lekhraj Singh was alive and Sher Singh's consent to the transfer was not enough. There is a cross-objection by the plaintiffs respondents, who challenge the findings of the trial court that there was legal necessity for transferring property worth about Rs.3,600 and that consequently, the plaintiffs could not get a decree for possession unless they paid Rs.3,600 to the defendants. There is no dispute in this appeal about other findings.

The most important question is whether there was legal necessity for the execution of the sale deed. The property sold was the entire zamindari, total area 499 bighas, 2 biswas, bearing aggregate land revenue of Rs.810-11-4, together with the entire *sir* land of total area 104 bighas, 3 biswas, a grove land and some isolated plots of the area 9 bighas, 17 biswas, a house, a *chaupal* and a cattle-shed, all situated in village Shamo. Ranjit Singh and the widow lived in mohalla Partabpur, Agra, about seven miles from Shamo. It is stated in the sale deed that the consideration of Rs.20,000 was received by the widow in cash, Rs.2,550 as earnest prior to the execution and Rs.17,450 in cash at the time of the registration. The following is the gist of the legal necessity recited in the sale deed :

Ranjit Singh was indebted to the extent of Rs.3,000 to Chunni Lal and there were no means of discharging the debt. Money was also required to file suits in civil and revenue courts, for prosecuting the persons accused of the murder of Ranjit Singh and for obtaining a succession certificate on account of which the widow had to borrow Rs.8,500 (Rs.3,200 from Bhulai Singh, Rs.500 from Bishambhar Nath, Rs.1,800 from Priya Lal, Rs.2,000 from Chandi Prasad and Rs.1,000 from Girwar), and the creditors were pressing her to repay the money.

The widow was *pardanashin* and unable to manage the zamindari.

There was a controversy whether the sum of Rs.3,000 alleged to be due to Chunni Lal was included in the amount of Rs.8,500 borrowed by the widow. The language used in the sale deed is ambiguous ; the reference to the debt due to Chunni Lal might have been made to explain the need for borrowing Rs.8,500 as well as to explain the need for executing the sale. The sale was executed undoubtedly for repaying the loans of the total of Rs.8,500 borrowed by the widow herself for certain objects ; but it is not very clear whether the debt due to Chunni Lal was paid out of those loans or out of the consideration of the sale. Since the recital in the sale deed was about the legal necessity for executing the sale, it is more reasonable to hold that the reference to the debt due to Chunni Lal to one of the legal necessities, the other legal necessity being the repayment of the loans of the aggregate amount of Rs.8,500. There were two debts, one contracted by Ranjit Singh and the other by the widow and it seems that the sale was executed to discharge both. The reference to the loans seems to be connected with the needs of the widow herself (to file suits, prosecute the murder case and obtain succession certificate) and not with the debt due to Chunni Lal. The debt due to Chunni Lal was not paid before the execution of the sale deed. Therefore, it could not be said that the loans were taken by the widow also with the object of paying him off. The trial court has disbelieved the evidence of Chunni Lal's son, Bishambhar Nath Khazanchi, to the effect that the debt was repaid after the execution of the sale ; the evidence is certainly open to criticism, but even if it were disbelieved, there is nothing to suggest that the debt had been repaid before the execution of the sale, i.e., out of the loans of Rs.8,500. The debt due to Chunni Lal at the time of its repayment must have been more than Rs.3,000. I am not saying that it must have been paid off wholly from one loan borrowed by the widow ; but if a substantial part of it was paid off out of any of the loans borrowed by her, it must have been out of the loan borrowed from

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Bhulai Singh, but the evidence of Girwar, shows that the loan borrowed from Bhulai Singh had nothing to do with the repayment of the debt due to Chunni Lal. I therefore, find that Rs.3,000 due to Chunni Lal were not paid out of the loans and that the sale purports to have been executed to discharge liabilities to the extent of Rs.11,700, (including Rs.200 spent on registration). No other necessity is recited in the sale deed itself.

The trial court has accepted the evidence of the defendants that the widow had borrowed Rs.3,200 from Bhulai Singh, Rs.1,000 from Girwar, Rs.1,800 from Priya Lal and Rs.500 from Bishambhar Nath and paid them off from the sale proceeds. Bhulai Singh, Girwar, Priya Lal and Bishambhar Nath, (other than P. W. Bishambhar Nath Khazanchi), are all dead. There is the evidence of Nathu Ram to prove the loans taken from Bhulai Singh and Girwar and also their repayment. There is nothing in his evidence on account of which it might be disbelieved. The evidence about the loan taken from Priya Lal is given by his son, Shiam Sunder, though it is all hearsay. There is no evidence about the loan taken from Bishambhar Nath, but the sale deed has been attested by Priya Lal and Bishambhar Nath and since it contains the recital that the money had been borrowed from them, the recital should be taken as correct. The remaining loan of Rs.2,000 is said to have been taken from Chandi Prasad and Balbhaddar who also are dead; Baldeo Behari deposed that Chandi Prasad told him on his enquiry that he was a creditor of the widow. The trial court has in spite of doubts believed the evidence of Baldeo Behari and the recital. I accept the finding of the trial court that the widow had borrowed Rs.8,500 from Bhulai Singh, etc.

As regards the legal necessity, the payment of Rs.3,000 to Chunni Lal was undoubtedly a legal necessity; it was a debt due from Ranjit Singh and had to be paid out of his estate. The trial court has accepted only this payment as legal necessity. It held that the amount of Rs.5,500, (Rs.8,500, the amount of the loans minus Rs.3,000), was not borrowed for legal necessity. Only

one succession certificate was obtained and it was for Rs.2,360 and would not have cost more than a hundred rupees. As regards expenses incurred in prosecuting persons for the murder of Ranjit Singh there is no documentary evidence and it is not known how much money was spent after borrowing. The prosecution was launched by the State and was conducted by the Government pleader ; the judgment of the trial court is on the record and does not contain the name of any lawyer who might have been engaged by the widow to look after the prosecution or to watch her interests. Bharat Singh denied that any lawyer was engaged. There were two civil suits fought by Ranjit Singh or the widow, was suit no. 3 of 1895 for pre-emption against the widow who was the vendee ; it was decreed on 27th April, 1895, and the pre-emptor acquired possession over the property on 8th September, 1895. Under the decree the widow was to get Rs.3,300 from the pre-emptor and must have got the money before the pre-emptor was delivered possession over the property on 8th September, 1895. She got the costs of the suit from the pre-emptor ; she must have spent something more, but there is no evidence whatsoever about the amount. The other suit was no. 38 of 1896 to enforce a mortgage ; the widow was impleaded as a defendant because she was a subsequent transferee of the mortgaged property. She did not contest the suit and incurred no expenses over it. There is no evidence of any summary suits or of rent suits. The total annual rental demand in respect of the property in dispute was Rs.1,200 ; in two years after the death of Ranjit Singh not more than Rs.2,400 would have fallen due on account of rent from tenants and if none of it was paid and suits had been instituted to recover the whole amount, it does not appear that she would have spent more than Rs.400 as calculated by the trial court. Thus the only amount proved to have been spent by the widow on obtaining the succession certificate and in the litigation, civil and revenue, was Rs.600 as found by the trial court. This expenditure was undoubtedly a legal necessity which would justify alienation of a part of the estate. A widow cannot alienate her estate in order

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to pay off debts incurred by herself, unless they themselves were incurred for legal necessity.

It was contended before us that the loans must be presumed to have been contracted by the widow for legal necessity from the lapse of time and the deaths of the widow, Sher Singh, Gopal Chand and other persons who could give evidence about the legal necessity. It is undoubtedly true that the suit has been instituted very late and that the respondents have waited till almost the end of the period of limitation for it. The right to sue accrued to them on 5th October, 1932, and they filed the suit on 21st January, 1944. They have not offered any satisfactory explanation for the delay in filing the suit. When any person files a suit to contest a will on the ground of its being a forgery, or an inheritance on the ground of illegitimacy, a very considerable time after the defendant had acquired possession under the will or by inheritance, the defendant, "in order to defend his status, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons", vide *Rajendro Nath v. Jogendra Nath* (1). Legal necessity cannot be presumed as a matter of law, from the lapse of time, as pointed out by the Judicial Committee in *Bhojraj v. Sita Ram* (2). Lord ROCHE speaking for the Judicial Committee observed at page 756, "Regard must be had to the amount of evidence likely to be available after the lapse of a long time and presumptions should be allowed to fill in gaps disclosed in the evidence. . . . Presumptions not to supplement but to contradict the evidence would be out of place." A Bench of this Court in *Ramanand Lal v. Damodar Das* (3) recognized that there is no hard and fast rule about presumptions to be made either with regard to recitals in the deed of transfer or with regard to the question whether legal necessity existed or whether a representation of its existence was made and was believed after a *bona fide* enquiry, and said at page 115 "Each case will have to be considered on its

(1) (1870,72) 14 M. I. A. 67, 77. (2) 1936 A. L. J. 755.

(3) A. I. R. 1942 All. 110.

merits and presumptions may be made which are consistent with the evidence, the probabilities and the surrounding circumstances in the case When the recital in the deed is silent as to the necessary, in the proper case, having regard to probabilities, circumstances and evidence in the case, a presumption may be raised either with regard to the factum of the necessity or with regard to representation of the necessity". The law was stated by a Full Bench of the Madras High Court in *Subrahmanyam v. Soorayya* (1), as follows :

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"If owing to lapse of time direct evidence of the facts and circumstances recited has disappeared, then the recitals acquire importance as observed by the Judicial Committee in *Banga Chandra v. Jagat Kishore* (2). In such cases a recital consistent with probability and the circumstances of the case cannot lightly be set aside

What about cases where there are not even recitals of necessity ? Has lapse of time any, and if so what effect? Lapse of time does not shift the burden of proof from the purchaser to the reversioner who impugne a sale by the limited owner."

In the words of VISWANATHA SASTRI, J., in the same case at page 520, "lapse of time cannot conjure up a chain consisting entirely of missing links". The burden of proof must remain on the person alleging necessity and "to say that a suit by a reversioner to recover property alienated by a Hindu widow must fail in the absence of any evidence about the necessity of the loan would be in effect to abrogate the rule of limitation that he is entitled to institute a suit for the recovery of the property within 12 years of the date of the death of the limited owner" : *Jai Narain Singh v. Collector of Aligarh* (3), per ALLSOP, J.

(1) A. I. R. 1950 Mad. 514.

(2) (1917) I. L. R. 44, Cal. 186.

(3) 1942 A. L. J. 152, 155.

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Coming to the circumstance, I find from the evidence that since the murder of Ranjit Singh resulted in the prosecution of tenants or residents of village Shamo, no rent was paid by the tenants of the village and the widow or her servants did not even dare to visit the village. Relations between Ranjit Singh and Nand Kishore, (who was another lambardar in the village), were very much strained and the tenants of the village espoused the cause of Nand Kishore. There had also been many famines in the village in the year when Ranjit Singh was murdered and 3-4 years previously. Ranjit Singh died indebted and his financial condition was not at all good as would appear from his account books. He was only a retired Railway doctor and had practically no income from practice. At the time of his death, his account in the Imperial Bank of Agra was overdrawn by a little less than Rs.1,000. The overdraft was repaid a few months after his death. In the first six months of 1894, he did not deposit any money in the Bank and instead went on withdrawing it. The widow did not get any income from the estate for two years and must have spent money for her own maintenance and for the payment of the land revenue. On behalf of the respondents it was pointed out that the widow acquired money from other sources. Their witness Sohan Pal stated that the medical hall of Ranjit Singh was sold for Rs.1,000 and his carriage and pony for Rs.250. He could not tell the name of the doctor who purchased the medical hall. He never saw the previous medical hall of the doctor. He could not tell who purchased the carriage and the pony; neither the sale took place in his presence, nor the payment of money to the widow. He also deposed about sale of grains in village Shamo for Rs.2,000; this sale also did not take place in his presence and his evidence is nothing but hearsay. The appellants' witnesses denied that there were any grain pits in Shamo containing grains of Ranjit Singh. The widow must have realized some money from the sale of the medical hall and the carriage and the pony, but we cannot accept the hard statement of Sohan Pal about the amount. The widow realized Rs.3,300 under the pre-emption

decree. There was a mortgage in favour of Ranjit Singh but there is no evidence of the widow's having received any income from it.

It is true that in considering whether the widow had legal necessity or not one must take into account not only the expenses but also the income; the widow cannot after pocketing all the income alienate the estate in order to meet all necessary expenses, such as for maintenance, marriage, payment of husband's debt, etc. Whatever income the widow received from the preemptor and the sale of the medical hall, etc., must be taken into account in deciding whether she could meet the expenses of litigation, her own maintenance, etc., without incurring any debt. I am satisfied that she was not able to meet all the necessary expenses without borrowing. It is admitted by Bharat Singh himself that after the sale, she went to her father's place with only Rs.6,000. She had sold the property for Rs.20,000 and must have spent Rs.14,000 out of the sale proceeds before leaving Agra for good. Rs.12,000 were spent out of the sale proceeds in paying off the antecedent debts. It follows that she had no money left just before she executed the sale and that she had not saved anything from the sale of the medical hall, etc. She was, therefore, obliged to borrow in order to meet the expenses. From the income from the sale of the medical hall and the money received from the pre-emptor she must have discharged Ranjit Singh's liabilities to the Bank, paid the land revenue and maintained herself; it may be that the income from the sale and the pre-emption decree money was not enough even for these expenses. In view of these circumstances, it can be presumed from the delay with which the suit was instituted that all the loans amounting to Rs.8,500 were contracted by the widow for legal necessity. Legal necessity has to be proved; mere recital of its existence does not prove it. "Necessity must be proved and the mere recital in the deed of alienation is not sufficient proof. An equitable modification has also been admitted in the case where the alienee has in good faith made proper enquiry and been led to believe that there was a case of true necessity"; see

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Rangaswami Gounden v. Nachiappa (1). The reason given by the Judicial Committee is that the reversioner's right would always be defeated by insertion of carefully prepared details, if the recitals were relied upon to prove the facts contained therein; see *Banga Chandra v. Jagat Kishore* (2). If, however, owing to lapse of time direct evidence of the facts and circumstances recited has disappeared, the recitals acquire importance. The lapse of time will save the alienee from an adverse reference arising from the sketchy nature of the evidence adduced by him and will allow presumption to fill in details in the evidence which had been obliterated by time; see *Subramanyam v. Sorrayya* (3). The appellants are entitled to the presumption that Rs.8,500 were borrowed for legal necessity. The widow could alienate the estate so far as necessary to raise the amount of Rs.11,500.

There was thus legal necessity to justify alienation so as to raise Rs.11,500. There is no recital whatsoever of any legal necessity for alienation of more property. There is much disparity between the amount of Rs.20,000 for which the property in dispute was sold and Rs.11,500 for which some of it could be sold. The widow had no justification whatsoever to sell all the property in dispute when the legal necessity could be satisfied by sale of a little more than half of it. If a widow sells property for legal necessity for a certain amount but only a part of it is applied to satisfy the necessity, the whole sale would be upheld because the vendee is not bound by the law to see that the whole amount paid by him is applied to satisfy the necessity. "It would rather appear that in any case where the sale has been held to be justified, but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been extended for proper purposes and for the benefit of the family;" see *Sri Krishn Das v. Nathu Ram* (4). The reason is that "where the purchaser acts in good faith and after due inquiry, and is able to show that the sale itself was justified by legal necessity, he is under no

(1) (1919) I. L. R. 42 Mad. 523.

(2) (1917) I. L. R. 44 Cal. 186.

(3) A. I. R. 1950 Mad. 514.

(4) A. I. R. 1927 P. C. 37.

obligation to enquire into the application of any surplus", *Sri Krishn Das v. Nathu Ram* (1). But it should be noted that the whole sale must purport to have been made for legal necessity. As emphasized by the Judicial Committee in *Sri Krishn Das v. Nathu Ram* (1), one must not lose sight "of the true question which falls to be answered in such cases, viz., whether the sale itself was one which was justified by legal necessity". The principles laid down above will not apply when the sale itself does not purport to have been made entirely for legal necessity, as in the present case. Here, the sale itself professed to be made not to raise Rs.20,000 for legal necessity but to raise only Rs.11,500 for legal necessity. Had there been the recital in the deed or had there been any evidence to the effect that it was represented to the appellants that the widow required Rs.20,000 for legal necessity, the sale could be upheld though it was proved that only Rs.11,500 were actually spent by the widow on legal necessity. When it was not even represented to the appellants that Rs.8,500 more were required for legal necessity, they could not take shelter behind the plea that they were not bound to see that this amount also was applied to satisfy legal necessity. In *Niamat Rai v. Din Dayal* (2), the sale of the property in suit was found to be for legal necessity, but out of the purchase money of Rs.43,500, Rs.38,000 were spent on legal necessity and the whole sale was upheld. In *Inderjit v. Jaddu* (3), the property was sold for Rs.4,623, partly for legal necessity and partly for payment of the widow's antecedent debt, which was not for legal necessity, and it was held that the sale was valid only to the extent of the legal necessity. Here, the nearest reversioner joined the widow in the execution of the sale and yet the sale was held to be valid only in part. The vendee was not held to be entitled to the benefit of the rule laid down in the case of *Sri Krishn Das* (1) because the sale itself purported to have been executed in part for a necessity that was not legal necessity. In the case of *Ramanand Lal* (4) it was pointed out that where a part of

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(1) A. I. R. 1927 P. C. 37,41.

(3) A. I. R. 1933, All. 169.

(2) A. I. R. 1927 P. C. 121.

(4) A. I. R. 1942 All. 110.

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the transfer or a part of the consideration of the transfer is not justified by legal necessity or by a representation of legal necessity which the transferee had believed, the unjustified consideration or transfer will not bind the reversioner and that the doctrine of the case of *Sri Krishn Das* (1) does not apply where the transfer itself professes to be for partial necessity, with regard either to its consideration or to the property transferred. If the property is such as cannot be sold in part, sale of the whole may be justified even though there is legal necessity for sale of a part of it, but that was not the case here. The Zamindari property itself consisted of a share, any portion of which could be sold by the widow. Then there were houses and *sir* rights which could have been exempted from sale. If legal necessity existed to justify sale of the bulk of the property and the portion in respect of which there was no justification is a small portion, it may be ignored and the whole sale may be held to be justified, but here the portion of the sale in respect of which there was no justification was not a small or negligible portion, being only a little less than one-half.

Where in a suit by a reversioner for possession of property alienated by the widow it is found that the alienation was justified in part and not in its entirety, the reversioner would be entitled to a decree for possession of the whole property on condition that he paid to the alienee the consideration for the part of the sale that was justified; see *Inderjit v. Jaddu* (2). Accordingly, if the matter rested here, the respondents would be entitled to a decree for possession of the property in dispute on condition that they paid Rs.11,500 together with expenses of the execution of the sale-deed to the appellants.

The appellants rely upon the consent of Sher Singh as justifying the entire sale. Sher Singh joined the widow in execution of the sale deed and this is more than his consent to the alienation. He was admittedly the next reversioner. The case of the respondents is that he was not the only next reversioner and that his brother, Lekhraj Singh was alive at the time of

(1) A. I. R. 1951 C. 37.

(2) A. I. R. 1933 All. 169.

the execution of sale and had not given his consent in any manner. So I come to the question whether Lekhraj Singh was alive then or not. There is considerable oral and documentary evidence. The witnesses examined by the respondents tried to make out that Lekhraj Singh died in September, 1906, but their evidence is unreliable. Bharat Singh could not give a consistent account of the years of births and of deaths of Ranjit Singh, Sher Singh and Lekhraj Singh. He deposed that Lekhraj Singh died at the age of 40 but according to the entry in the chaukidar's death register, he died at the age of 65. There could not have been such a serious mistake either in the entry in the death register or in the statement of Lekhraj Singh's own son Bharat Singh, unless there was some confusion about the year of the death. Chiranji Lal deposed that Lekhraj Singh, died in 1904—1906 and that Sher Singh died two years earlier; but according to Bharat Singh, Lekhraj pre-deceased Sher Singh. Chiranji Lal said at one place that the widow went to her father's home, (after the sale of the property in dispute), when he was 18 years old, and at another place he said that he was only 8—10 years old. He admitted having good relations with the respondents; that may account for his falsely stating that Lekhraj Singh was alive in 1897. Chhattar Singh deposed about Lekhraj's death in 1903 and his signing a Mukhtarnama by Gulzar Singh in 1906, a Mukhtarnama by Ganga Bux Singh and a Mukhtarnama by Bhopal Singh. This witness belongs to another village; admittedly, he had not received any letter from Lekhraj and had never seen any writing or signature of Lekhraj in the last 39 years and had not informed the respondents that he had seen Lekhraj attest the deeds. He himself was not another attesting witness of the deeds and one fails to understand how the respondents knew that he had seen Lekhraj sign. He could not recognize Sher Singh's handwriting, nor Ranjit Singh's, nor Bharat Singh's. Ganga Bux Singh executed any Mukhtarnama; on the contrary, the Mukhtarnama was executed in his favour. The evidence of this witness is wholly useless. Sohan Pal stated that Lekhraj was alive when the widow was thinking of selling her property in

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dispute. He did not say anything about it in the examination in chief. Not only is he one of the respondents, but also his evidence does not inspire confidence. He could not say why Ranjit Singh was murdered; it is surprising that he did not know this in spite of the prosecution.

The documentary evidence filed by the respondents is all forged. There is a copy of an entry in the death register of the chaukidar, showing that Lekhraj died on 18th September, 1906, at the age of 65 years. This copy was filed in court on 25th April, 1944, the date fixed for settlement of issues. The appellants applied for the original death register to be summoned on 5th July, 1944, and it was produced on 25th July, 1944, by the record-keeper. On 28th July, 1944, the appellants made an application in the court alleging that the entry in the death register was a forgery being a clear interpolation and that it might be photographed. The application was allowed on 19th August, 1944, and the appellants got the entry photographed. The death register of 1906 maintained in the Collectorate had been destroyed. The chaukidar's book which has lined pages contains entries of death and birth both; entries of death are made at one place and entries of birth at another place. The entries are checked from time to time by some official, who makes an endorsement about the check. The endorsement occupies two lines and whenever there is an endorsement of a check, two lines remain blank, (except for the endorsement). But in endorsement of check, just where the entry of death of Lekhraj is made, there is only one line left blank now and it is clear that the entry was interpolated in the other line that was left blank while making the endorsement. Moreover, the date of death is much higher than should have been if the entry had been made normally in an entirely blank line. A look at the photograph is enough to show that the entry of Lekhraj's death has been interpolated in the blank space which happened to have been left for the purpose of an endorsement of checking made on the 18th September, 1906, and the endorsement left in the book of the chowkidar, which

was utilized by the respondents for forging an entry of the death of Lekhraj. The book commenced from 1905 ; the earlier book used by him must have been deposited at the police station and was not available for forging an entry. The respondents have also produced three Vakalatnamas and one Mukhtarnama purporting to bear signatures of Lekhraj made in 1905 ; they also are not free from suspicion. The mukhtarnama was executed by Gulzar Singh of village Barauri in favour of Jiwan Ram of the same village on 26th April, 1905, and it is attested by the three witnesses, Naubat Singh, Sarup and Lekhraj Singh. Naubat Singh's and Sarup's signatures find place before that of Lekhraj Singh and they are residents of village Barauri. The Mukhtarnama was executed in Khurja. Signatures of two witnesses were more than enough and yet Lekhraj Singh was asked to sign as a third witness. The parties to the deed and the first two attesting witnesses all belonged to Barauri ; Lekhraj Singh was the only person who had nothing to do with Barauri. The Mukhtarnama was executed in order to be used in a court at Khurja and these persons of Barauri had an occasion to be in Khurja in connexion with the case but Lekhraj had no occasion to be in Khurja. It is significant that Bharat Singh was not asked to prove the signature of Lekhraj Singh on this document. One Vakalatnama was executed by Chhotey Lal, Srimati Ranchi and Ram Saran Das on 1st May, 1905, for use in the same case at Khurja. It is signed by two witnesses, Pitambar and Lekhraj, (the Vakalatnama is not correctly printed in the paper book, pages 136-137; the signatures of the executants are mixed up with the signatures of the attesting witnesses). There was no necessity of two attesting witnesses and the signature of Lekhraj appears to have been interpolated subsequently. The executants were all of village Ali Ahmadpur, and the attesting witness Pitambar. Only Lekhraj was of another village. It is too much of a coincidence that Lekhraj happened to be in Khurja at the time when the people of Barauri executed a Vakalatnama on another date when the people of Ali Ahmadpur executed a Vakalatnama and that by May 1905

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happens to be put at a place where it could be by interpolation. The word "اس" is written in Urdu before the signature of each attesting witness ; but the last letter "س" of the word is written differently against the signature of Lekhraj and the word "اس" does not appear to have been written by the scribe who wrote the word against the signature of the other attesting witness showing clearly that the signature of Lekhraj is an interpolation. There are two more Vakalatnamas executed on 26th April, 1905, in the same case ; in them also the signature of Lekhraj is the last signature. I am not prepared to believe that Lekhraj signed these Vakalatnamas.

Though the appellants' counsel did not admit the existence of Lekhraj, there is no doubt that he did exist. The khatauni of 1882 of village Asafpur shows that Lekhraj Singh, Sher Singh and Ranjit Singh were three brothers. It has not been explained by the respondents how they knew that the Mukhtarnama and the Vakalatnamas filed in some case of another village, with which they had no concern, had been signed by Lekhraj 38 years ago. There is hardly any doubt that they got the signature of Lekhraj forged on the documents and produced them in court. I am not holding that the signatures of Lekhraj on the documents were forged by comparing them with his authenticated signature ; I am not assuming the role of an expert. I hold on the circumstantial evidence that the signatures are a forgery.

The appellants have not led any evidence to prove when Lekhraj died but could not be expected to do so. Lekhraj belonged to Jahangirpur in Agra District and died there, whereas the appellants belonged to Patiala and did not know anything about Lekhraj. They cannot be expected to know when and where he died. There is no reference to Lekhraj at all in the sale deed ; on the execution contains the statement that the executants were his co-parceners and that Sher Singh was his son. Had Lekhraj been alive, there would have been no need for the executants not only ignoring his death but also denying it. We have no reason to believe that the widow or Gopal Chand was acting

fraudulently. The sale deed does not contain any false recital; even though the sale was made for Rs.20,000, necessity for raising Rs.11,500 only was recited. It might be said that they were interested in making the sale appear legal but the same could not be said of Sher Singh, who would not have falsely denied the existence of Lekhraj and would not have claimed that he was the sole next reversioner. Lekhraj is said to have remained alive for nine years after the execution of the sale but took no action to impugn it by a declaratory suit. Not only was his reversionary right affected by the execution of the sale deed but even his very existence was denied by it and he should have normally rushed to the court at once. The execution of the sale was not a matter left in secrecy at all since everybody knew about it. Bharat Singh stated that Lekhraj consulted lawyers and yet he did not file any suit in his lifetime. In the plaint itself the respondents made no reference to Lekhraj's not joining in the execution of the sale and did not state that he died or that he was alive when the sale was executed. The signature of Sher Singh was alleged to be insufficient not because he was not the only next reversioner but because he was of weak intellect and too much dependent upon the widow to be a free agent. No one reading the plaint would ever think that besides Sher Singh there was another next reversioner. Having regard to all the circumstances, I come to the conclusion that Lekhraj was not alive at the time of the sale in question. There is hardly any occasion for applying the rule that the onus of proving the year of Lekhraj's death lay upon the appellants; the entire evidence relating to the year of death is on the record and the question of onus has lost all importance. Had the evidence left any doubt, the question of onus might have been of importance because then the party on whom the onus would have failed. But the evidence on this point is sufficient for the finding that Lekhraj was dead when Sher Singh was, therefore, the only next reversioner.

The effect of a consent to alienate property through joining in the act of alienation, as in the case of a state depends upon several facts, viz. the nature of the act, the intention of the parties, and the nature of the property. In the case of a state, the consent of the state is necessary to the validity of the act, and the nature of the property is also a consideration. The consent of the state is necessary to the validity of the act, and the nature of the property is also a consideration. The consent of the state is necessary to the validity of the act, and the nature of the property is also a consideration.

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a sale or some other transfer leaving the title in the widow, whether it is of the entire estate or a part of it, whether the consent is given by all the reversioners next and remote or by some of them and whether it is given by all the next reversioners or by some of them. A widow can always surrender the estate to the next reversioner. She can by voluntary act operate her own death; just as on her actual death the inheritance will reopen to the next reversioner, so also on her civil death resulting from complete effacement. The surrender must, logically, be of the entire estate and in favour of the whole body of the next reversioners. In order to be tantamount to civil death, it must be such as to produce the effect which would have been produced if she had really died. If she surrenders the estate to the next reversioners, they would become the absolute owners and would have unfettered right to alienate it on any ground. The Hindu Law does not prohibit or prevent the two acts being done simultaneously or through one document; a widow can surrender the estate to the next reversioners and they can alienate it through one document. Consequently a Hindu widow and the next reversioners can execute a deed of sale of the entire widow's estate without any necessity and the vendee will acquire absolute title. This result cannot be achieved if only some of the next reversioners join in execution of the sale or if the sale is in respect of a part of the widow's estate and not the whole, or if the alienation is a mortgage or lease which still keeps the title in the widow; in such cases the next reversioners will be bound on the death of the widow, only if the alienation is backed by legal necessity. This distinction between a sale and any other transfer, such as a lease or mortgage, and the distinction between sale of the entire estate and sale of a part of it have at times not been kept in mind with the result that conflicting opinions have been expressed by courts. The widow's joining in the execution of a sale by herself or with some of the next reversioners does not confer absolute title upon the vendee. The question of necessity for the sale, as well as the question of the widow being the sole next reversioner and the estate; in every other case,

the question of legal necessity for the alienation will arise and the only effect of the reversioner's joining the widow in the act of alienation will be, if at all, to raise a presumption of legal necessity. The presumption would be a presumption of fact and not conclusive and would be liable to be rebutted. The alienee may rely upon the presumption and not lead any evidence in the first instance to prove that the alienation was for legal necessity, or that a representation of legal necessity was made to him and he had believed it after a bona fide inquiry; the onus would then shift to the next reversioner to prove that in fact there was no legal necessity. Any of the following three consequences can thus arise out of a reversioner's joining the widow in an alienation:

- (1) The alienation confers absolute title on the alienee irrespective of any necessity,
- (2) it raises a presumption that the alienation was for legal necessity, and
- (3) it has no effect at all.

A next reversioner's joining the widow in the act of alienation is one act and his giving consent to the alienation another act, and the question whether the two acts have the same legal effect or not has been a matter of controversy. The Judicial Committee has tacitly accepted the view that a consent by the next reversioners stands on the same footing as joining the widow in the act of alienation, but a serious doubt about the correctness of the view has been cast by the Supreme Court, though it has left the question open and even proceeded on the basis that it is correct. It is unnecessary for me to go into the merits of the controversy because here the next reversioner has joined the widow in the act of alienation and not merely consented to it.

I shall now deal with the earliest expressions of the law. One of the earliest expressions of the law is by the Judicial Committee in *Rajee Chunder v. Gokool Chunder* (1); there a widow alienated the estate without legal necessity and the deed was attested

(1) (1869-70) 10 M.L.J. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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by some kindred of the deceased husband. The Judicial Committee held that the sale was not binding upon the next reversioner on the widow's death. Sir James W. COLVILLE, delivering the Judicial Committee's opinion, observed at page 228 : "Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindoo Law. That it can be, as Mr. Field seemed to put it, a presumption of law in the sense of "*presumption juris et de jure*", their Lordships do not think." Their Lordships did not accept the contention that mere attestation of a sale deed imports concurrence and also were not satisfied that the attesting witness was the then next reversioner. Consequently, there was no consent by the next reversioner and the sale being of only a part of the estate it could not amount to relinquishment by the widow of her widow's interest. It was in reply to the contention of the vendee that the mere consent of the attesting witness validated the sale, that their Lordships observed that in some cases consent may validate the sale by raising a presumption that it was for a legal necessity ; since they were considering the case of sale of a part of an estate, they observed that the consent, even of the next reversioner, would not, as a matter of law, validate the sale. Their Lordships were not considering a sale of the entire estate and were not laying down any law regarding the effect of consent to such a sale. *Nobokishore v. Harish* (1) is a decision of a Full Bench of the Calcutta High Court which equates consent by the next reversioner with the consent of the widow in the act of alienation. Their Lordships observed that a widow can always relinquish her widow's estate in favour of the next reversioner. It is added to say : "If it is once

established, as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation, which the widow and the next heir may thus agree to make. And it seems equally impossible to deny, that for a long series of years this Court has treated and considered such alienation as lawful" (p. 1108). The next reversioner there had not joined the widow in alienating the estate but had only given his consent to the alienation and the question arose whether it had the same effect as his joining the widow in the act of alienation. The learned CHIEF JUSTICE had his own doubts and was of the view that "to allow the widow to relinquish her estate to the next male heir of her husband, is one thing ; but to allow her to sell the whole inheritance, without any legal necessity, merely with the consent of the next male heir, so as to bar the rights of other heirs of her husband in the future, is another thing" (p. 1109). But he felt bound by a long course of authority in the High Court and held that the consent had the same effect as joining in the execution to validate the sale. MITTER, J., agreeing, observed at page 1110 : "If the widow is competent to relinquish her estate to the next male heir of her husband, it follows, as a logical consequence, that she can alienate it merely with his consent without any legal necessity." PRINSEP, J., referred to the case of *Raj Lukhee Dabea* (1) and observed at page 1111 : "It has been settled law in Bengal that a Hindu widow by relinquishing her rights in favour of the heir to her husband's estate accelerates his inheritance, and that the effect of a conveyance by her and such heir is to convey the absolute estate."

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The next case to be considered is *Bajrangi Singh v. Manokarnika* (2), the facts of which were that a widow sold the entire estate through three deeds executed in 1872 and 1875, the sale deeds were ratified and confirmed by the then next heir. A suit was brought by the next reversioner after the widow's death to recover possession over the estate.

(1) (1869-70) 13 M. I. A. 209.

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alienee. The Judicial Committee dismissed the suit on the ground of the ratification or consent. The entire estate was sold by the widow and the sale was consented to, though subsequently, by the then next reversioners; it was, therefore, a valid sale irrespective of the question of legal necessity and the vendee acquired an absolute title. Their Lordships over-ruled the then prevailing view of this Court that no reversioner possesses such a present vested interest as to enable him to combine with the widow in defeating the other reversioners and observed that it was at variance with the principle itself and not in accordance with the practice in other parts of India where the Mitakshara law prevails and approved of the Calcutta view that consent of all the next reversioners would validate the sale. In the case of *Rangaswami* (1) there was a gift of a part of the estate by a widow with the consent of the next reversioner and their Lordships held that it could be avoided by the next reversioner on the widow's death. The gift was not for a purpose recognized by the Hindu Law, and it being of only a part of the estate, the consent of the reversioner could not have any greater effect than that of simply raising a presumption of legal necessity, and since the circumstances were such as to be inconsistent with any such presumption, the gift was bound to be set aside at the instance of the next reversioner. Lord DUNEDIN uttered a warning against being entangled in western notions of what a Hindu widow might do and emphasized the distinction between the power of surrender or renunciation and the power of alienation for certain specific purposes. Dealing with the power of surrender his Lordship said that it was founded on certain texts of the Smritis and that it was settled by long practice that "a Hindu widow can renounce in favour of the nearest reversioner ~~the~~ be only one or of all the reversioners nearest in the ~~and~~ more than one at the moment", i.e., "she can ~~execute~~ ~~her~~ voluntary act operate her own death" (page 80). ~~the~~ Lordship referred to the case *Nobokishore* ~~and~~ repelled the idea that a widow ~~could~~ ~~transfer~~ ~~any~~ part of the estate provided she

(2) (1884) I. L. R. 10 Cal. 1102.

surrendered her complete interest in it, observing that "there cannot be a widow who is partly effaced and partly not so" (page 532). His Lordship then observed : "The surrender once exercised in favour of the nearest reversioner or reversioners the estate became his or theirs, and it was an obvious extension of the doctrine to hold that, inasmuch as he or they were in title to convey to a third party, it came to some thing if the conveyance was made by the widow with his or their consent. This was decided to be possible by the case of *Nobokishore* (1)". Thus the view taken in the case of *Nobokishore* (1) that consent by the next reversioner (s) was equivalent to his (their) joining the widow in the alienation was accepted. His Lordship then proceeded to consider the power of alienation. It is to be noted that the question of exercising the power of alienation would arise only so long as the widow has not suffered death, natural or civil by surrender ; this was made clear by his Lordship's pointing out that if the alienation be total and the reversionary heirs be the nearest, it falls within the power of surrender. Discussing the power of alienation, his Lordship pointed out that an alienation in order to be valid must be for legal necessity, that legal necessity must be proved or the alienee must have acted in good faith after proper inquiry and been led to believe that there was legal necessity and that the alienation may be fortified by the consent of the reversionary heirs. His Lordship then laid down that if the alienation was partial, the reversioner's consent would not give force *per se* but would be evidential value and referred to the case of *Raj Lukhee Dabea* (2). The reasons given were : "If mere consent as such of the reversioner could validate alienation, then the rule as to total surrender would be an ideal rule. And secondly mere consent could only validate the theory that the reversioner together with the widow represented the whole estate. But that is impossible, for the reversioner has a vested interest, while the widow has only *"spes successionis"*." His Lordship explained the decision in the case of *airvi*, (3)

(1) (1884) I. L. R. 10 Cal. 1102.

(3) (1908) I. L. R. 35 Cal. 1102.

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a suit was brought after her death by the actual reversioners for possession. MUKHERJEE, J., said at page 661: "The doctrine of surrender or relinquishment by the widow of her interest in the husband's estate which has the effect of accelerating the inheritance in favour of the next heir of her husband is now a well-settled doctrine of Hindu Law", but held that the surrender was invalid because it was not in favour of only the next reversioners. At page 662 he said that effacement by the widow "may be effected by any process and it is not necessary that any particular form should be employed. All that is required is that there should be a *bona fide* and total renunciation of the widow's right to hold the property." It follows that there need not be an express surrender or renunciation by the widow; surrender may be implied from an act of alienation to a third person by her and all the next reversioners. At page 663 the learned Judge stressed the fact that the deed of alienation was not one executed by the widow and the next reversioner jointly in favour of the stranger; the next reversioner did not figure as executant "nor even as an attesting witness" and, therefore, the alienation could not be deemed to be a surrender by the widow to the next reversioner and an alienation by the latter to the stranger. On page 664 it is said: "It would be quite consistent with established principles of law if the widow relinquishes her interest in the husband's estate and the reversioner, in whom the estate vests, transfers the estate either in whole or in part to another person. If the transfer is of the entire estate, the two transactions may be combined in one document and the widow and the reversioner might jointly transfer the whole estate to a stranger but the implication in such cases must always be that the alienee derives his title from the reversioner and not the widow." And then a doubt is thrown on the extension of this doctrine in the case of *Nobokishore* (1). Professedly the assumption that *Nobokishore's* case (1) was accepted by the learned Judge distinguished it from the present case because there was no evidence of any intention on the part of the reversioner. In *Bhola Nath v. Jai Lal* (1884) 10 Cal. 118, the learned Judge distinguished it from the present case because there was no evidence of any intention on the part of the reversioner.

(1) (1884) 10 Cal. 118.

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an alienation by a widow in which the next reversioner joined and following *Nobokishore v. Harinath* (1) the learned Judges upheld the alienation as valid. They said that the alienation purported to be "a conveyance by which the widow was selling her widow's estate and the reversioner, his reversionary interest". The contrary view taken by a Bench of this Court in *Fateh Singh v. Rukmini Rawanji* (2) and *Ram Dayal v. Mithoo Lal* (3) and by the High Court of Patna in *Thakur Prasad v. Dipa Kuer* (4) cannot be accepted as correct. In the case of *Fateh Singh* (2) there was not a sale but a gift in favour of a family idol and it was assented to not by all the three next reversioners but by only two of them. Obviously the consented gift could not be deemed to be equivalent to relinquishment by the widow in favour of the next reversioners and a gift by them to the idol. One of the consenting reversioners filed a suit for possession after the widow's death and he was held to be estopped from suing. But some of the reasons given in support of the decision are against the weight of authority, particularly to that of the Judicial Committee of the Privy Council and the Supreme Court. For instance it was said at page 389 that the two reversioners had no interest in the property at the time of the consent, which they could assign or relinquish because so long as the widow did not die they had nothing more than a *spes successionis*. Of course, so long as a widow does not die the presumptive reversioner has no right or interest in the property because he has only a *spes successionis*, but it is equally true that the estate would vest in him if the widow dies either a natural or a civil death by relinquishment. Whether the estate should be deemed to have vested in the consenting reversioner was not discussed at all. It may not be correct to say that a widow and the nearest reversioner together represent the entire estate, but it does not follow that an alienation of the entire

(1) 18 A. I. R. 1923 All. 387.

(3) A. I. R. 1931 I. L. R. 10 Pat. 352.

estate, by a widow jointly with all the next reversioners does not amount to her civil death and to the alienation by the next reversioners of the estate vesting in them. In the case of *Ram Dayal* (1) it is not known whether the gift by the widow, consented to by the next reversioner, was of the entire estate or a part; if it was of only a part, it was rightly observed by GOKUL PRASAD, J., that the consent would only raise a presumption that the alienation was for a legal necessity. The statement at page 411 of the learned Judge that the consent of the next reversioner does not amount to relinquishment because he had no vested interest which could be relinquished, is too broad; it will not hold good when the entire estate is alienated by the widow. In the case of *Thakur Prasad* (2) it was also said by DHAVLE, J., at page 362, that a "reversioner's consent does not by itself operate to validate an alienation by a Hindu widow but is only presumptive evidence that the alienation was proper". The effect of consent by all the next reversioners to an alienation of the entire estate by the widow was not considered in the case at all. The alienation in the case of *Kali Shanker Das. v. Dhirender Nath* (3) was a mortgage and probably of a part of the widow's estate; therefore, it was held that the consent did not validate the alienation. MUKHERJEA, J., observed at page 318: "The alienation here was by way of mortgage and so no question of surrender could possibly arise". The consenting reversioner was the next reversioner; therefore, the consent had some legal effect and since it could not be to validate the alienation, it could be only to "raise a presumption that the transaction was for legal necessity or that the mortgagor had acted therein after proper and bona fide inquiry and has satisfied himself as to the existence of such necessity, (p. 318). In *U. P. v. Gajendra Singh* (4) the statement is repeated that the consent of the reversioners merely affords evidence of the lawfulness of the alienation; it is not the consent which validates the alienation; there was of a part of the estate, and it was, but the judgment does not purport to say that the consent of the reversioners is necessary for the validity of the alienation.

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(1) A. I. R. 1923 All. 410.

(3) 1955 S. C. A. 309.

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of consent by all the next reversioners to alienation of the entire estate. There is an observation of SULAIMAN, J., that consent will not validate it if the necessity alleged in the deed is not such as is recognized by the Hindu Law; if a particular necessity is alleged in the deed, the consent may raise the presumption that that necessity existed, but if the alleged necessity is not a legal necessity within the meaning of the Hindu Law, the consent will not raise a presumption that another necessity recognized by the Hindu Law as legal existed. As pointed out by DANIELS, J. C., in *Manzuran Bibi v. Janki Prasad* (1) at page 52, when the purpose for which an alienation is made is known, there is no room for any presumption and the court's function merely is to examine whether the purpose is one which the Hindu Law recognizes as valid. The question whether there was necessity or not would arise only if the alienation was not deemed to be a surrender by the widow followed immediately by an alienation by the next reversioner; if the alienation was of part of the estate, no fault can be found with the observations made by the learned Judge. *Mohd. Said Khan v. Darshan Singh* (2) follows the case of *Rangaswami*; the alienation there was of part of the estate and it was rightly observed at page 80 that the consent of a reversioner is no conclusive proof, but simply raises a presumption, of the existence of legal necessity. The alienations in *Debi Prasad v. Golap Bhagat*, (3) [which was approved of by their Lordships in the case of *Rangaswami* (4)], *Harendra Nath v. Hari Pada* (5) and *Bajrang Bahadur v. Rameshwar Bux* (6) were of parts of the estates and so it was held that the consent could only raise a presumption of legal necessity.

The sale by the widow in the case before us was of the entire estate and not by her from Ranjit Singh. Nothing executed by her after the sale. Sher Singh was the only son and reversioner; there were remoter reversioners who could not have inherited the estate if the widow was the widow at the date of the sale. Execution of

(2) (1928) I. L. R. 50 All. 75.
 (4) (1919) I. L. R. 42 Mad., 523.
 (6) (1937) 166 I. C. 113.

the sale by her and the next reversioner is in the eye of law her dying a civil death, Sher Singh's inheriting the estate and his selling it to the appellant's father. No sale by him can be challenged on the ground on which the sale by the widow is challenged; he passed absolute title regardless of any question of legal necessity. The title acquired by the appellants is, therefore, indefeasible. The consent of Sher Singh was impeached on the ground that he had received consideration. He was employed as a compounder by Ranjit Singh on a monthly salary. He is said to have been living jointly with the widow up to the date of the sale. It cannot be said from those facts that his consent was purchased by the widow or the appellant's father. Even if he derived some gain from the consent, it will not affect the validity of the sale. The very basis for holding the sale to be valid is that it is as good as a sale by Sher Singh himself. There could not be a sale by Sher Singh except for consideration and no alienation by him could be impeached on the ground that he derived a gain from it. The suit of the respondents must, therefore, fail.

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It is unnecessary to decide whether the decree for mesne profits was correctly passed, but, in order to complete the judgment, I would deal with the question. The appellants contended that the sale in their favour was voidable and not void, that the respondents did not give them any notice of their intention to avoid it, that they elected to avoid the sale only by instituting the suit and that consequently no decree for mesne profits for the period prior to the institution of the suit could be passed in their favour. I have explained in *Hanuman Prasad v. Indrawati* (1) what is meant by an alienation by a Hindu widow being voidable after her death. If the absolute title did not pass to the appellant under the sale, the title to it would have vested in the respondents immediately on the widow's death. The appellants' possession would have become unlawful and they would have become liable for mesne profits. It is not necessary for the next reversioner to institute a suit to avoid the sale.

(1) First Appeal No. 232 of 1942, decided by May 5

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upon the alienee that he intends to treat the alienation as void. In *Mummareddi's* case (1) mesne profits for the period commencing from the date of the widow's death were allowed to the next reversioner. So there is nothing wrong with this part of the decree.

There was a small controversy about the exact consideration of the sale. The ostensible consideration was Rs.20,000, Rs.17,450 were paid in cash at the time of the registration and Sher Singh admitted having received Rs.2,550 previously. This was the amount of earnest paid by the appellant's father, evidence of which was given by Ram Nath. The trial court disbelieved his evidence, because there was no documentary evidence and the sale deed does not explain when the amount was paid. I do not think the non-mention of the payment of earnest in the sale deed was conclusive. How the consideration was received was not required by any law to be stated in the sale deed. At the time of the registration the executants did say that they received the amount earlier; it is hypercritical to say that they did not say that it was received as earnest. The appellant's father was a respectable man; he was a Magistrate. He would not have told a falsehood for the sake of Rs.2,550 only. All the attesting witnesses of the sale deed are dead except Kallu, who has stated that the sale was for Rs.20,000. It must be held that the sale was for Rs.20,000.

I would allow the appeal, dismiss the cross-objection, set aside the decree passed by the trial court and dismiss the suit of the respondents with costs of both courts.

BEG, J.—I agree.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice James and Mr. Justice T'akru

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United Provinces Municipalities Act, 1916 ss. 178, 180 (5), 298—
U. P. Town Improvement Act, 1919 s. 49—Bye-laws framed
under s. 298 Municipalities Act, read with s. 49 (1), Town
Improvement Act, if applicable to an area within the
municipality and covered by an Improvement scheme—
Powers of Municipal Board, transferred to Trust under
s. 49, Town Improvement Act, effect of—Notice of construc-
tion under ss. 178, 180 (5), United Provinces Municipalities
Act, read with s. 49 (1), Town Improvement Act, if and
when due to the Trust.

G. P. took on lease a plot of land in the Mumfordganj
Housing Scheme from the Allahabad Improvement Trust and
made certain constructions thereupon without notice to and
sanction from the Trust.

Complaint by the Trust under s. 185, United Provinces
Municipalities Act, read with s. 49, U. P. Town Improvement
Act, was dismissed by the Sub-Divisional Magistrate holding that
the bye-law no. 30, sub-head (h) (vi) of the Allahabad Muni-
cipality framed under s. 298 of the United Provinces Muni-
cipalities Act, did not apply to the above housing scheme.

On appeal by the State and a revision application by the
Trust :

Held, (i) that the bye-laws framed under s. 298, United
Provinces Municipalities Act, as a sort of addenda to several
sections of the said Act as specified in s. 49 (1), United Provinces
Town Improvement Act, were, by virtue of the said provision
of the latter Act, applicable to an area within the municipality
and covered by an Improvement scheme ;

(ii) that powers of the Municipal Board are transferred
under s. 49, U. P. Town Improvement Act, to the Trust, which
can hence enforce the bye-laws of the Municipality ;

(iii) that ss. 178, 180 (5), United Provinces Municipalities
Act, read with s. 49 (1), U. P. Town Improvement Act, enjoin
that a person shall give notice to the Trust of his intention to
erect a new building where the building is adjacent
to a public street, place or premises owned by the Government
or the Trust unless by an order in writing, in writing, or by
of giving notice is extended to the Trust by the Magistrate.

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(iv) that S. D. M. did not in the instant case record a finding that notice was not necessary;

(v) that the case be sent back to the Magistrate for a re-trial.

Government Appeal no. 81 of 1955 (connected with Criminal Revision no. 1288 of 1954), from an order of Sub-Divisional Magistrate, Chail, Allahabad, dated 31st May, 1954.

The facts appear in the judgment.

The *Government Advocate* for the appellant.

Harnandan Prasad and *Gopal Behari* for the respondent.

TAKRU, J. :—This appeal by the State of U. P. is directed against an order of the Sub-Divisional Magistrate, Chail, district Allahabad, by which he dismissed a complaint filed by the Improvement Trust of Allahabad under section 185 of the U. P. Municipalities Act, read with section 49 of the U. P. Town Improvement Act. The Improvement Trust through its administrator has also filed revision application against the same order. As both the appeal and the revision application are directed against the same order, I propose to dispose them of by a common judgment.

The facts leading up to the order under appeal are not in dispute and may be briefly summarised as follows.

The respondent to this appeal is one Sri Gir Prasad Gupta, who also styles himself as Sri Gir Prasad Varshney. He took a plot of land—being plot no. 552—in the Mumfordganj Housing Scheme, Allahabad, on lease from the Allahabad Improvement Trust—hereinafter to be referred as the Trust—on certain terms and conditions, and entered into possession thereof. It appears that some time after coming into possession of the said plot he erected constructions thereon but without giving notice to the Trust and obtaining the sanction of the Trust. On 1st November, 1951, the Secretary of the Trust informed the respondent, (Ex. P-2), that the Trust had come to know that the respondent had erected constructions over the said plot without the previous sanction of the

Trust ; and he was, therefore, asked to stop further constructions at once and to show cause why proceedings for making those unauthorized constructions should not be taken against him. Thereafter on some date, which is not clear, the respondent sent a letter to the Chairman of the Trust, informing him that as there was some uncertainty with regard to the boundaries of the respondent's plot and as he—the respondent—had collected building materials which were being stolen, he had, with the permission of the authorities, constructed four rooms on the understanding that they would be included in the map of the whole plot when the boundaries came to be fixed. It was also mentioned in that letter that a notice had been received by him from the Trust to the effect that those constructions were unauthorized and that they would be demolished on the 15th February, 1952. The letter wound up with the prayer that as the demolition would be very unjust and illegal and would cause irreparable loss to the respondent, the said constructions might be approved and sanctioned and further proceedings in respect thereof might be stayed. Thereafter the Chairman of the Trust sent a letter, dated the 9th February, 1952 (Ex.P-3), to the respondent, stating that the Secretary and the Assistant Engineer had gone to inspect the site on the 7th February, 1952, and had found the work of unauthorized constructions on the said plot going on in full swing and the respondent was asked to stop further constructions at once on pain of rendering himself liable to legal proceedings. The respondent obviously paid no heed to this letter because we find that on the 2nd April, 1954, the Trust sent a notice to him through its counsel Sri S. N. Pathak to the effect that the respondent had "without execution and completion of the lease taken possession of the plot and started making constructions over it without the permission of the Trust", and asked him to hand over possession of the plot to the Trust failing which a suit would be filed against him. Apparently the respondent did not heed this notice for we find that some time after this, the Chairman of the Improvement Trust sent a notice to the respondent for making the buildings on the plot unauthorized constructions.

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without permission, and for committing breach of bye-law no. 30 (h) (vi), page 81 of the Allahabad Municipality Part 1, rules and bye-laws, corrected up to the 31st May, 1936 ; and the complaint was forwarded to the Additional District Magistrate, Allahabad, for taking cognizance under section 191 (1) (c) of the Criminal Procedure Code. In due course the case came up for trial before Sri R. N. Lal, Sub-Divisional Magistrate, Chail. After recording evidence and hearing arguments, he dismissed the complaint on the ground that the prosecution had failed to prove that the bye-law of the Allahabad Municipality on which they relied had been made applicable to the Allahabad Improvement Trust by any enactment or notification. As stated above, both the appeal and the connected revision are directed against this order of dismissal passed by the learned Sub-Divisional Magistrate.

The complaint which was filed against the respondent was for making unauthorized constructions on plot no. 552, Mumfordganj Housing Scheme, without permission and against bye-law no. 30, sub-head (h) (vi), page 81 of the Allahabad Municipality Part 1, rules and bye-laws corrected up to the 31st May, 1936. Bye-law no. 30 has been framed by the Allahabad Municipality under the authority conferred upon it by section 298 (2) of the U. P. Municipalities Act under List I—Head “A” Building, Sub-head (h) (vi). Sub-head (h) (vi) authorizes the municipalities to prescribe with reference to “erection . . . of a building, the number and height of the storeys of which the building may consist” ; and in pursuance thereof the Allahabad Municipality framed bye-law 30 laying down that—

“No building intended for or used for human habitation shall have a height of less than . . . any point of the floor level . . . the case of houses on roads with . . . more than 30 feet where the . . . be at least 14ft.”

The prosecution of the respondent was sanctioned and commenced in respect of the following unauthorized constructions :

- (1) Construction of two rooms, measuring 12'×10'×12'-9".
- (2) Two rooms 8'×12'-9" of less height.
- (3) One room measuring 14'-9"×6' roofing with tin shed at a height of 6'-9". Under section 185 of the U. P. Municipalities Act, read with section 49 of the Town Improvement Act of 1919.

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Now under bye-law 30, the least permissible height of a room intended for human habitation has to be 10 ft., except in the case of houses which are situate on roads with a width of more than 30 ft., where the height has to be at least 14 ft. As the prosecution of the respondent has also been commenced for infringement of this bye-law it has to be assumed that the constructions in question have been made on a road which has a width of more than 30 ft., for otherwise the prosecution of the respondent could not succeed, even if the legal question of the applicability of the bye-laws to areas situate within municipal limits and covered by improvement schemes under the U. P. Town Improvement Act was held in favour of the appellant. Besides learned counsel for the respondent has not made any grievance on this point before us. Indeed, he and the learned counsel for the appellant were agreed that the order in question will fall or stand according as to whether the said bye-law applies or not to an area within the municipal limits of Allahabad in respect of which an improvement scheme is in force. As no other point was pressed before us, we shall straightway proceed to the examination of the merits of the rival contentions on this point and in order to appreciate the said contentions a reference to Section 19 of the U. P. Town Improvement Act is absolutely necessary. The material portion of that section runs as follows:

[illegible]

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218 to 224, 236, 256, 257, 261, 265, 266, 267 (except in respect of cleansing and disinfecting), 268 to 270 and 278 of the Municipalities Act shall, so far as may be consistent with the tenor of this Act, apply to all areas in respect of which an improvement scheme is in force; and for the period during which such scheme remains in force all references in the said sections to the Board or to the Chairman, or to any officer of the Board, shall be construed as referring to the Trust which in respect of any such areas may alone exercise and perform all or any of the powers and functions which under any of the said sections might have been exercised and performed by the Board or by the Chairman or by an officer of the Board :

Provided that the Trust may delegate to the Chairman or to any officer of the Trust all or any of the powers conferred by this section.

(2) The Trust may make bye-laws for any area comprised in an improvement scheme which is outside the limits of the municipality—

- (a) generally for carrying out the purpose of this Act, and
- (b) in particular and without prejudice to the generality of the aforesaid powers the Trust may make bye-laws regarding any of the matters referred to in section 200 of the Municipalities Act."

Section 178 of the U. P. Town Improvement Act, *inter alia* provides that the provisions of sections 178 to 186 of the U. P. Town Improvement Act applicable to an area in respect of which an improvement scheme is in force and which is outside the territorial limits of a municipality. Section 178 of the U. P. Town Improvement Act provides that in an area in respect of which

an improvement scheme is in force but which lies outside the limits of a municipality. It has been admitted before us that the Mumfordganj Housing Scheme is such an improvement scheme and further that that scheme is in respect of an area which falls within the limits of the Allahabad Municipality. It follows, therefore, that sections 178 to 186 along with a number of other sections of the U. P. Municipalities Act, with which we are not concerned here, have been made applicable to the area which is covered by the Mumfordganj Housing Scheme. The question which next arises is whether section 49 (1) of the U. P. Town Improvement Act has also made the bye-laws, which have been framed by the Allahabad Municipalities Act as sort of addenda to some of those sections of the Municipalities Act which are mentioned in section 49 (1) of the U. P. Town Improvement Act, applicable to area which lies within the limits of a municipality and which is covered by an Improvement Scheme. As stated above, it is only if those bye-laws are applicable to such an area that the prosecution of the respondent for infringement thereof can be allowed to proceed and not otherwise. It is to be noted that section 298 of the U. P. Municipalities Act, which authorized a Municipal Board to frame bye-laws, is not mentioned in section 49 (1) of the U. P. Town Improvement Act. That section, however, runs as follows :

"298. (1) Power of Board to make bye-laws—A board by special resolution may, and where required by the State Government shall, make bye-laws applicable to the whole, or any part of the municipality, consistent with this Act and with any rule, for the purpose of promoting or maintaining the health, safety, and convenience of the inhabitants of the municipality and for the furtherance of the administration under this Act."

(2) In particular, and in relation to the generality of the bye-laws made under sub-section (1), the bye-laws made by the Municipal Board, Allahabad, in 1957, are valid."

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wherever situated, may, in the exercise of the said power, make any bye-law, described in List I below and the Board of a municipality, wholly or in part situated in a hilly tract, may further make, in the exercise of the said power, any bye-law described in List II below.

Section 185 of the U. P. Municipalities Act under which the respondent's prosecution has been sanctioned runs as follows :

"Illegal erection or alteration of a building—Whoever begins, continues or completes the erection or re-erection of, or any material alteration in, a building or part of a building or the construction or enlargement of a well, without giving the notice required by section 178, or in contravention of the provisions of section 180, sub-section (5), or of an order of the Board refusing sanction, or any written directions made by the Board under section 180 or any bye-laws, shall be liable upon conviction to a fine which may extend to five hundred rupees."

This section, as its language shows, is only a penalising section and lays down the maximum penalty which a person is liable to incur on conviction for infringement of any of the provisions of sections 178 and 180 of the U. P. Municipalities Act or of any bye-laws made thereunder. The effect, to my mind, of section 49 (1) of the U. P. Town Improvement Act is to incorporate therein all the sections of the U. P. Municipalities Act which are mentioned in that section, including section 185, in their entirety, with only one difference, viz. that the words "Board", "Chairman" or any other officer of the Board", wherein occur in those sections of the Municipalities Act shall be interpreted as referring to the "Trust" or its delegates in the first proviso to section 49 (1) of the Town Improvement Act. And since section 185 of the Municipalities Act also refers to

"any bye-laws" it follows that all the appropriate bye-laws have also to be regarded as parts of the sections, (i.e. sections 178 and 180), referred to therein. Those, bye-laws would, therefore, be treated as part and parcel of the sections to which they relate, and would be deemed to be incorporated in the U. P. Town Improvement Act not as bye-laws but as part of the main sections themselves. It is true that the Municipal bye-laws are framed under section 298 of that Act, and not under the different sections thereof, but that, to my mind, is purely a matter of draftsmanship, intended to avoid repetition, which would otherwise have been inevitable. On this view of the matter, once a bye-law has been framed, it must be regarded as part and parcel of the parent section for the better and effective working of which it has been framed. In the present case, however, it is not necessary to go that length because both sections 178 and 180, mentioned in section 185 of the U. P. Municipalities Act, themselves state that the provisions contained therein are subject to "any bye-law" which may be made by the Municipal Board. The expression "unless by a bye-law" used in those sections can only mean that the bye-laws dealing with the matters covered by those sections have to be read along with those sections and not as something separate therefrom. Besides, the interpretation which I have attempted to place on section 49 (1) of the U. P. Town Improvement Act is in consonance with the well-known principle governing the interpretation of statutes, viz. that as far as possible the courts should prefer that construction which furthers the vowed object of the statute, rather than that which retards or impedes it, unless the language of the statute clearly excludes that interpretation. The U. P. Town Improvement Act was enacted, as its preamble shows, "for the improvement and expansion of towns in the United Provinces". The bye-laws, which have been framed by the Allahabad Municipality, including the bye-law which we are concerned in the present case, have to be read as section 298 (1) of the U. P. Municipalities Act, "for the purpose of promoting and maintaining the safety and convenience of the inhabitants of the Municipality".

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It is obvious that any scheme which pretends to be for the "improvement" of a town cannot be anything but illusory if it fails to take into account bye-laws framed for the purposes of promoting the health, safety and convenience of the inhabitants thereof. Any other interpretation of section 49(1) of the U. P. Town Improvement Act would lead to the anomalous result that an area within municipal limits, which was subject to certain bye-laws designed to promote the health, safety and convenience of the inhabitants thereof, would be deprived of the benefits of those salutary rules as soon as an improvement scheme was initiated in respect thereto. A construction which would lead to such a manifest and gross absurdity must be avoided, unless the language of the section is so clear as to leave no option in the matter. It is also to be noted that, by adding sub-section (2) to section 49 of the U. P. Town Improvement Act, the Legislature made it clear that it was aware that in working an improvement scheme in an area outside the municipal limits where naturally there would be no appropriate bye-laws in existence, it would be necessary to frame the same and it, therefore, gave the Trust necessary powers to make them. Could it be imagined that a legislature which was careful enough to invest the Trust with powers to make rules and bye-laws for areas situate outside municipal limits would intend the existing rules and bye-laws in respect of areas within municipal limits to come to an end? In my opinion the answer must unhesitatingly be given in the negative.

In this view of the matter the learned Sub-Divisional Magistrate was clearly in error in dismissing the complaint on the ground that the prosecution had failed to prove that the bye-laws framed by the Allahabad Municipality, with which we are concerned in the present case, was not applicable to the Mumfordganj Housing Scheme.

There is, however, yet another reason why the order passed by the Sub-Divisional Magistrate cannot be sustained. In the complaint against the respondent

embraced two charges ; one for making constructions without permission, and the other for infringing bye-law no. 30, made by the Allahabad Municipality under sub-head (h) (vi) of section 298 of the U. P. Municipalities Act. The first charge clearly related to sections 178 and 180 (5) of the Municipalities Act, read with section 49 (1) of the U. P. Town Improvement Act. There is no dispute that section 178 of the U. P. Municipalities Act has been incorporated in the U. P. Town Improvement Act, by virtue of section 49 (1) thereof. The relevant portion of section 178 of the U. P. Municipalities Act, runs as follows :

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“ 178. (1) Before beginning, within the limits of the municipality—

- (a) to erect a new building or new part of a building, or
- (b) to re-erect or make a material alteration in a building, or
- (c) to make or enlarge a well,
a person shall give notice of his intention to the board.

(2) The notice referred to in sub-section (1) as required in the case of a building shall only be necessary where the building abuts on, or is adjacent to, a public street or place, or property vested in Government or in the Board, unless, by a bye-law applicable to the area in which the building is situated, the necessity of giving notice is extended to all buildings.

(3) * * *

After making the necessary adaptations authorized by section 49 (1) of the U. P. Town Improvement Act this section for purposes of the latter Act would read as follows :

“Before beginning, within the limits of the Municipality,—

- (a) to erect a new building or new part of a building, or

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(b) to re-erect or make a material alteration in a building, or

(c) to make or enlarge a well,
 a person shall give notice of his intention to the Trust.

(2) The notice referred to in sub-section (1) as required in the case of a building shall only be necessary where the building abuts on, or is adjacent to, a public street or place, or property vested in Government or in the Trust, unless, by a bye-law applicable to the area in which the building is situated, the necessity of giving notice is extended to all buildings.

(3) * * *

The language of the section is clear and unequivocal. It states that a person, who intends to erect a new building, as in this case, shall before beginning the said erection give a notice of his intention to do so to the Trust, but that such a notice shall only be necessary where the building abuts on or is adjacent to a public street or place or property vested in (Government) or in the Trust, unless, by a bye-law applicable to the area in which the building is situated, the necessity of giving notice is extended to all buildings. Section 180 of the U. P. Municipalities Act, which is also one of the sections mentioned in section 49 (1) of the U. P. Town Improvement Act, after making the necessary adaptations authorized by the latter section, would read as follows :

“Subject to the provisions of any bye-law, the Trust may either refuse to sanction any work of which notice has been given under section 178 or may sanction it absolutely or subject to”.

(and here follow a number of conditions with which we are not concerned in the present case).

Sub-section (5) of section 180 is as follows :

“No person shall commence any work of which notice has been given under section 178 unless sanction has been given or deemed to have been given under this section.”

Any breach of sections 178 and 180 (5) of the Municipalities Act is made punishable under section 185 which also is one of the sections incorporated in the U. P. Town Improvement Act. A close analysis of the aforesaid sections of the U. P. Municipalities Act, which have been incorporated in the U. P. Town Improvement Act, makes it clear that apart from any bye-law which might have been made by the Municipality concerned under sub-section (2) of section 178 requiring the giving of notice in every case of the nature referred to in sub-section (1), thereof, the section itself requires the giving of a notice if the proposed building is likely to abut on or be adjacent to a public street or place or property vested in (Government) or in the Trust. And if the proposed building is likely to be hit by sub-section (2) of section 178 of the U. P. Municipalities Act, read with section 49 of the Town Improvement Act, no work can be commenced in respect of it under section 180 (5) until sanction has been given or deemed to have been given in the Trust. The Sub-Divisional Magistrate could not, therefore, dismiss the complaint without first recording a finding that it was not necessary for the respondent to give a notice to the Trust, as the conditions laid down in sub-section (2) of section 178 of the U. P. Municipalities Act, read with section 49 (1) of the U. P. Town Improvement Act, did not obtain in the present case.

For the reasons stated above, I am of the opinion, that this appeal and the connected revision must be allowed, the order of the court below set aside and the case sent back for re-trial in the light of the observations made above.

JAMES, J. :—I have read the carefully prepared judgment of my brother TAKRU and agree with his conclusion that the appropriate bye-laws of the Allahabad Municipality do apply to the area covered by the Mumfordganj Housing Scheme. Fairly, the conclusion may be arrived at by another line of reasoning. The bye-laws of the Municipality are without valid ones.

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The area in question lies within the limits of the Municipality, but since section 49 of the Town Improvement Act, debars the Trust from framing bye-laws for that area, that area must continue to be governed by the bye-laws of the Municipality. A person who contravenes any of those bye-laws becomes liable under the law. But how are the bye-laws to be enforced? The answer is supplied by the wording of section 49 whereby the powers of the Board stand transferred to the Trust. It follows that the Trust was within its rights in prosecuting the respondent for a breach of the bye-laws framed by the Municipality.

By the Court—For the reasons given in the above judgment the appeal and the connected revision are hereby allowed and the order of acquittal passed by the Sub-Divisional Magistrate set aside. The case is sent back to the Magistrate concerned for re-trial in the light of the observations made in the judgment of TAKRU, J.

Appeal allowed.

SUPREME COURT APPELLATE CIVIL

*Before the Honourable S. R. Das, Chief Justice and
Aiyar, Sinha, Kapur and Sarkar, JJ.*

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RAJA GANGA PRATAP SINGH (APPELLANT)

v.

THE ALLAHABAD BANK LTD., LUCKNOW
(RESPONDENT)

[On Appeal from the High Court at Allahabad]

Uttar Pradesh Zamindar's Debt Redemption Act, 1953, s. 2 (f)—
Debt—Question raised as to exclusion of certain debts
invalid—Constitution of India, 1950 Arts. 14, 228—Civil Pro-
cedure Code, 1908, s. 113, proviso—Application to state case
to High Court as to validity—Entertainable—Even if protec-
tion not available

In a suit for recovery of money due under an instrument of
mortgage by the Allahabad Bank against a zamindar, the defen-
dant claimed that under the Uttar Pradesh Zamindar's Debt

APPELLATE CIVIL

Before Mr. Justice Dayal and Mr. Justice Upadhyaya

MAHANT PARSHOTTAM GIR (PLAINTIFF)

V.

MAYANAND GIR AND OTHERS (DEFENDANTS).

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Mahant—*Transfer—Adverse possession, starting point—Property sold as private property—Limitation—Date of sale—Property sold as Math Property—Cessation of Mahant's interest—Indian Limitation Act, 1908, 134, 134-A, 134-B, 144.* September, 3

Whenever property belonging to the Math is sold in execution of a decree, which is on account of a claim against the Mahant personally and not in connexion with the purpose of the Math, or, when the property is sold by the Mahant alleging it to be his personal property for the purpose not connected with the Math, the date from which adverse possession of the purchaser would begin would be the date of sale and not the date when the transferor-Mahant ceased to be the Mahant of the institution. It is only when the transfer Mahant transfers the property under a sale deed alleging it to be the property of the Math and purporting to sell it for the purposes of the Math that the adverse possession would begin after the Mahant ceases to be the head of the institution.

Case-law discussed.

First Appeal No. 523 of 1933, connected with First Appeal No. 557 of 1930), from a decree of Bind Basni Prasad, Second Additional Subordinate Judge of Banaras, dated the 22nd April, 1930.

The facts appear in the judgment.

G. N. Kunzru and R. D. Upadhyaya for the appellant.

G. S. Pathak, Jagdish Swarup, Ch. Kedar Nath and Krishna Shanker for the respondents.

The judgment of the Court was delivered by—

DAYAL, J.:—Mahant Parshottam Gir instituted a suit in 1927 against Mayanand Gir and a number of other persons, alleged to be the transferees of certain properties from Mayanand Gir, for recovery of possession of the property in suit on the declaration that Mayanand Gir ceased to be a Mahant of the Math Uttamgir, situate in mohalla Tripura Bhairvi, Banaras, on account of certain alleged misbehaviours and on the declaration that the transfers made by Mayanand Gir

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in favour of the other defendants were invalid. The plaintiff claimed a decree for Rs.15,000 for mesne profits.

The suit was brought on the following allegations :

The followers of Sanatan Dharam, the Shewaks, Rajas and Maharajas and rich people, having regard to the necessities of the Math and for the fulfilment of the objects of the Math, gave property for the purposes of the worship of gods and for meeting the necessities of the Math, that such property was used as private trust property, and that similarly a Math known as the Math of Mahant Uttamgiri was established in Banaras and a considerable property as a private trust was acquired in connection with that Math, that the annual income from such property was sufficient for purposes of the Math, and there was no necessity for incurring debts for carrying out the objects of the Math and for the worship.

The Mahant of the Math possessed all the powers of management and supervision of the private trust property relating to the Math. He could spend the income from the property for the objects of the Math and Sewa Puja but had no power to transfer the trust property of the Math except for the needs of the Math.

Mayanand Gir, defendant no. 1, had without any lawful necessity transferred a lot of property appertaining to the Math and had after taking consideration spent the same in meeting his unlawful expenses.

The other defendants 2 to 44 had knowingly and deliberately got the Math property transferred in their favour in order to provide money for the personal and unlawful expenses of defendant No. 1 in spite of the knowledge and information that the property was trust property and defendant No. 1 as a Mahant had no power to transfer the same.

Mayanand Gir, defendant no. 1, contested the suit on various grounds. It was alleged that it appeared from the account books and papers that Chetan Gir came from the Punjab side and settled in Banaras and after earning money, by carrying on different kinds of trade, he and his successors gradually acquired property and

later on a *kothi* dealing in banking business and styled *Kothi Uttam Gir* was started. This *Kothi* was then known after the names of Uttam Gir and Sheo Dat Gir. The ancestors of this defendant used to sell and purchase property for the purposes of their business. They used to carry on business with sale-proceeds of the property and used to borrow money and to pay it up.

He alleged that there used to remain large deposits of other persons in the *kothi* doing banking business, that interest thereon used to be regularly paid and that *hundi* business was carried on regularly.

He further alleged that when he attained majority, the amount of such deposits had reached about Rs.40,000. He got several houses constructed, made additions to the property and at the same time started business and that for this purpose and also for paying off the deposits he had to borrow money and that, when he could not pay up the debt, he felt it necessary to transfer the property in order to save reputation.

It was alleged that the property which was made a *waqf* by the predecessors of this defendant as well as the property which came within the purposes of the *waqf* was intact. The property transferred by this defendant was the property which the ancestors of this defendant had acquired by doing business. Of this later property some had been transferred in order to pay up debts and some out of personal necessity.

Mayanand Gir further alleged that the custom appertaining to his Math had been that the Gaddi Nashin Mahant was the owner of all the property with absolute powers, that he always carried on the management of the *waqf* property, which the ancestors of this defendant set apart for charitable purposes, and possessed full proprietary powers and that no other Sanyasi or member of another sect had any right to interfere.

The various contesting defendants raised some extra pleas in addition to those raised by Mayanand Gir defendant no. 1, against the plaintiff's claim. Mention of such extra pleas is made below.

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Defendant no. 2 is Sanatan Dharma Vidyalaya, Kashi. It is in possession of a house known as Dharmshala Uttam Gir no. 1/12-D situate in Bisheshar Nath Lane mentioned in item no. 9, Schedule 2, of land and houses in compound no. D-47/1, situate in mohalla Misir Pokhra, Banaras, and of land of mauza Dhuresher in village Ramanpura, item 16, Schedule 4. This defendant contested the suit on the ground that the plaintiff could not challenge the transfers to it in view of the facts that the aims and objects of the Vidyalaya were not inconsistent with those of the Math, that house no. D-1/12 had been dedicated by Uttam Gir for charitable purposes, that the transfers were made prior to the marriage of Mayanand Gir, defendant no. 1, that the plaintiff was estopped as he was a member of the Board of Trustees of the defendant institution and had never questioned the validity of the transfers which were made to his knowledge and that the defendant was a *bona fide* transferee for consideration and had spent very great amount on repairs and buildings.

Parshottam Joshi, respondent no. 3, now represented by respondents nos. 3 to 5 in First Appeal no. 523, contested the suit on the ground that he obtained a decree in suit no. 146 of 1925 in the court of the Subordinate Judge, Banaras, against Mayanand Gir for recovery of certain debts, that in execution of the decree he got Math no. 42/90D situate at Tripura Bhairvi, Banaras, (property mentioned at item no. 1, Schedule 2 attached), and that he was entitled to realize the amount of the decree by obtaining attachment and sale of the property mentioned in the plaint. It was further contended that the defendant had not obtained transfer of any property and was not in possession of any property.

Rai Bahadur B. Batuk Prasad, defendant no. 7, alleged himself to be the vendee of the entire property mentioned in Schedule 7 and of houses no. 42/14D, 42/24D, 42/26D, 42/66D and 42/105DA, situate in mohalla Tripura Bhairvi, Banaras, items nos. 7 to 11 of Schedule 3, and of a grove in village Birdopur, item no. 10 of Schedule 4, and contended that Mayanand Gir, Defendant no. 1, was by no means a Sanyasi of the type that

could not own any property, that his ancestors conducted business on their own account and defendant no. 1 himself did the same, that the property in dispute was self-acquired property of the ancestors of defendant no. 1 and was their personal property and never appertained to the Math, that the defendant no. 1 and his predecessors were secular men performing their duties like other worldly men and that the ancestors of the defendant no. 1 had a *kothi* of shroffs styled Uttamgirji Sheodatt Girji, that money used to be deposited by the public in that *kothi*, that defendant no. 1 incurred debts in connection with the business of the *kothi* and had made transfers in respect of the property for valid necessities, that the sales in his favour were for adequate consideration and that the list of movable property given in Schedule 7 was inaccurate, he having received only a few flower-pots and having placed some other articles mentioned in the Schedule in the grove after his purchasing it.

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Defendant no. 8, Shrimati Usha Bala Devi, vendee of house no. 42/92D, Mohalla Tripura Bhairvi, Banaras, item no. 12, Schedule 3, contended that defendant no. 1 and his predecessors had exercised such absolute proprietary rights over the properties in dispute that those properties lost by desuetude and adverse possession the character of Math property even if they belonged to the Math originally, and that the alienation in her favour was made on account of the necessity to make such alienation, the property having been acquired by defendant no. 1 and his *gurus* from their income from business and money-lending.

Daulat Ram, defendant no. 9 (b), he having been substituted as one of the heirs of Pt. Vaid Nath, defendant no. 9, Dongar Mal and Madan Mohan Shastri, defendants nos. 10 and 14 respectively filed a joint written statement. Defendants nos. 9 to 14 are all alleged to be the vendees of house no. 42/98D, Mohalla Tripura Bhairvi, Banaras. It was mentioned in paragraphs 4 and 8 of the additional pleas that in the aforesaid Math, i.e., Math Uttam Gir Sheo Datt Gir, money-lending and

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other businesses had been followed for a long time, that Goshain Uttam Gir in the same connexion purchased house no. 42/98 from his private funds and the income from the business and that the defendant spent over Rs.26,000 over the additions to this house after the purchase. It was further contended that the plaintiff had no right to sue the defendant when the house was purchased for the purpose of a Pathshala and an educational institution, which could be called important objects of the Math. Defendants nos. 10 to 13 have been replaced by Sri Marwari Sanskrit College and the names of defendants nos. 9 and 14 have been expunged.

Bishnath Prasad and Mahadeo, defendants nos. 15 and 16, are the vendees of house no. 42/105D, situate in Tripura Bhairvi, Banaras, (item no. 15, Schedule 3). They contended that they purchased this house in good faith for adequate consideration, that the ancestor of Mayanand Gir had purchased it in connection with his money-lending business and that Mayanand Gir inherited it. It was contended that the plaintiff's claim was barred by section 41 of the Transfer of Property Act. It was further alleged that the defendant had spent Rs.8,000 improving the condition of the house after purchasing it and that the plaintiff could not obtain possession of the house without paying this amount.

Neri, Mahadeo and Mahabir, defendants nos. 17 to 19, are said to be the vendees of house no. 44/ID, situate in Rani Bhawani Lane Brahmpuri, Banaras, (item no. 16 Schedule 3). Neri and Mahabir died and in their place the names of Nate and Ganesh, sons of Mahabir, were substituted. Defendants nos. 17 and 19 contended that they had honestly purchased from defendant no. 1 this house for adequate consideration under a sale deed, dated the 11th of December, 1914, that the suit was barred by limitation, that the house was sold when it had become very old and its repairs were apprehended to entail much expenditure, that the defendant spent about Rs.4,500 over the repairs of the house and that the plaintiff must pay this amount before ejecting them.

Bhagwan Datt Joshi, defendant no. 20, vendee of house no. 44/26-D, Rani Bhawani Lane, Brahmpuri, Banaras, alleged that he had honestly purchased the house on payment of full consideration for the resident of students, that the plaintiff never objected to it and that, therefore, the plaintiff's suit was barred by section 41 of the Transfer of Property Act. He further alleged that Mayanand Gir sold the house in order to satisfy the debts due to him, and that the house had been purchased by Sheo Datt Gir in his capacity as manager of the business of Goshain Uttam Gir in 1885.

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Tilak Chand, Ram Saran, Lachchmi Chand, Atma Ram and Hukum Chand, defendants nos. 21 to 25, were said to be in possession of house no. 44/28-D, Rani Bhawanipuri Lane, Banaras, Brahampuri, (item no. 19, Schedule 3). Tilak Chand, defendant no. 21, filed a written statement. It was adopted by defendants nos. 22 and 23. It was admitted in the written statement that the income of the Math, Uttam Gir Sheo Datt Gir, was many times more than what was required for the purposes of the Math and that there was no need for incurring debts. It was claimed that the defendants nos. 21 to 25, the plaintiff and Mayanand Gir, defendant no. 1, were among the descendants of Pt. Bhola Baba. It was alleged that the property belonging to the Math Uttam Gir included trust property and non-trust property, that with regard to the latter the Mahant could give it to the men of the ancestral family for purposes of residence and stay and that accordingly Mahant Kashi Gir had gifted in favour of the ancestor of the defendants the house in suit, that is, house no. 44/28, and that thereafter the ancestor of the defendants and they had been in adverse possession of the said house for more than 12 years.

Har Kishan Das, Jai Kishan Das, Udai Karan Das and Jagmohan Das, defendants nos. 29 to 32, were the usufructuary mortgagees of landed property in various villages, items nos. 18 to 36 of Schedule 4. They alleged in their written statement that Mayanand Gir and his ancestors were the owners of movable and immovable

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property in their own right and had complete rights of all description to appropriate and transfer their property, that from the time of Uttam Gir and his predecessors the ancestors and predecessors of defendant no. I used to follow various trades, out of which shroff's business was one and money-lending business through *hundis* and *mahajani* was practised by them in the circle of shroffs under the name of Uttam Gir and Sheo Datt Gir. People used to deposit their saving with them, that the defendants themselves had a *kothi* of shroffs and did money-lending, that Mayanand Gir took various sums of money under *hundies* from the defendants' *kothi* and at first executed a simple mortgage deed and later on being unable to pay the amount executed a usufructuary mortgage deed in favour of the defendants. The defendants were thus mortgagees in possession on payment of adequate consideration and in good faith.

Mahant Somvar Giri and Mahadeo Bharthi, defendants nos. 33 and 34, had execution proceedings pending against village Baragaon, item no. 1, Schedule 4, and Cantonment land, item no. 11 of Schedule 4, at the time of the institution of the suit and subsequently purchased this property. They contended that the money of *Akhara Panchayati Sri Niranjanji* of Goshain Naga sect had been deposited in the *kothi* of Uttam Gir Sheo Datt Gir, owned by Mayanand Gir by right of inheritance and carrying on moneylending business, that the aforesaid *akhara* obtained a decree against Mayanand Gir and the estate in his possession in suit no. 159 of 1925. It was contended that these defendants were not in possession of any portion of the property in suit and that they had been improperly impleaded. During the pendency of the suit, however, these defendants did purchase the property. It may be mentioned at this stage that no relief against them as mere decree-holders was claimed in the plaint.

Bishnath Upadhya, defendant no. 35, was the vendee of miscellaneous property in village Fatehpur attached to Khunta, item no. 14 of Schedule 4. His heirs contested the suit on the ground that the defendant no. 1

owned no other property in this village and sold this meagre property to the father of the contesting defendants in 1918 on receipt of adequate consideration.

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Brij Lal Misir and Kali Charan Pandey, defendants nos. 40 and 41 respectively, did not contest the suit. Brij Lal Misir was alleged to be in possession of various properties, mentioned at items nos, 39,42,43,44 and 45 of Schedule 4, as a thekedar. Kali Charan was alleged to be in possession of property mentioned at item no. 49 of Schedule 4 under a perpetual lease.

Shrimati Lachchmi Mani Devi, defendant no. 42, was alleged to be the vendee of house no. 42/95-D in mohalla Tripura Bhairvi, Banaras, (item no. 13 of Schedule 3). She contended that the property lost its character of Math property by usage and adverse possession even if it was at any time Math property, that the house in suit was the personal property of Mayanand Gir, that, even if it was Math property, Mayanand Gir was competent to deal with it according to the exigencies of the institution and that the alienation was necessitated and justified by legal necessity.

Beni Ram Misir, defendant no. 43, was alleged to be in possession of house no. 44/10-D, situated in Tripura Bhairvi, Banaras, item no. 17 of Schedule 3. Beni Ram Misir was further alleged to be in possession of village Deri, item no. 38 of Schedule 4. He denied that there was any transfer in favour of himself or defendant no. 44. He contended that he was the mortgagee with possession of house no. 44/10D under a possessory mortgage deed of 1900. Beni Ram Misir was a certificated guardian of Mayanand Gir, defendant no. 1, before he became major.

On these pleadings the learned Civil Judge framed the following 26 issues :

1. Is the pedigree given in the plaint correct?
2. Is the plaintiff a Dashnami Sanyasi of Giri sect? Was he elected by the Sanyasi fraternity as the Mahant of the Math in

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mohalla Tripura Bhairvi? Can the plaintiff or any of the Dashnami Sanyasis interfere with the affairs and management of the defendant no. 1 and his Math?

3. Is the *mahzarnama* relied upon by the plaintiff genuine and valid?
4. Is Hira Lal a properly and validly constituted *chela* of the defendant no. 1, and if so, what is its effect on the suit? Can the plaintiff maintain this suit?
5. Has the defendant no. 1 become degraded (*patit*) for reasons given in the plaint? Are the allegations made against the defendant that he has married and that he leads an immoral life and indulges in drinking and gambling correct? If so, what is its effect?
6. Are the properties in suit or any of them trust or Math properties, and are they not transferable?
7. Is the suit bad in view of the provisions of section 92 of the Civil Procedure Code?
8. Are the transfers made by the defendant no. 1 valid and binding, if the properties in suit are trust or Math property?
9. Whether the debts contracted by the defendant no. 1 for the purposes of the Math, if there is any in the proper sense of the term?
10. Are the defendants, other than the defendant no. 1, *bona fide* transferees for value? If so, what is its effect on the suit?
11. Is there any cause of action for the suit against the defendants?
12. Have any of the transferees spent money on the property purchased by them? If so, can they not be dispossessed without paying the amount spent by them?

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| 13. Is the suit undervalued ? Is the court-fee paid insufficient ? | 1956 |
| 14. Is the suit bad for misjoinder and multifariousness ? | MAHANT PAR- SHOTTAM GIR |
| 15. Is the suit bad for non-joinder of necessary parties ? | v. MAYANAND GIR |
| 16. Is the suit barred by estoppel ? | Dayal, J. |
| 17. What is the effect of the fact that the suit was filed against some dead persons and their heirs were subsequently brought on the record ? | |
| 18. Is the suit barred by limitation against any of the defendants ? | |
| 19. Is the plaintiff entitled to any mesne profits, and, if so, how much and against which of the defendants ? What amount of mesne profits should each of the defendants pay ? | |
| 20. Who is the owner of the movables in Birdopur ? Are they Math property ? | |
| 21. Are the properties claimed by the defendant no. 43 his own ? | |
| 22. Is the suit against the defendants nos. 36 and 37 not maintainable in the civil court ? | |
| 23. Is the frame of the suit defective as the respective liabilities of each of the defendants are not shown ? | |
| 24. Supposing that the properties in suit are Math properties, is their character lost by usage and adverse possession ? | |
| 25. What decree, if any, should be passed in this case ? | |
| 26. Have defendants Vidya Dhar, Sheodutt and Deodutt been made parties beyond ninety days after the death of defendant no. 6 ? If so, how does it affect the suit ? | |

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The learned Civil Judge decided issues nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14, 15, 23 and 24 in favour of the plaintiff.

The decision on issue no. 6 was that certain properties belonged to the Math and others did not. On issue no. 19 his finding was that the plaintiff was entitled to the profits of Rs.2 from schedule 4, item 15, and Rs.549 from Schedule 4, item 42, up to the institution of the suit and not from any other property held to be Math property by him.

He decided issues nos. 16, 17, 18, 20, 21, 22 and 26 against the plaintiff and recorded no definite finding on issue no. 12.

He accordingly decreed the suit in respect of the Math and some of the properties out of those claimed and dismissed the suit in respect of other items. The plaintiff filed F. A. no. 523 of 1933 in this Court against the dismissal of his suit and Mayanand Gir, defendant no. 1, filed F. A. no.557 of 1930 against the decree. This Court allowed Mayanand Gir's appeal and dismissed the plaintiff's appeal. The result was that the suit was dismissed.

The plaintiff filed two appeals to the Privy Council. They were ultimately disposed of by the Supreme Court, which finally disposed of issues nos. 1 to 5 in favour of the plaintiff and also finally decided part of issue no. 6, holding that house no. 42/90D was Math property and remanded the appeals to this Court for decision of the other points in controversy.

At the hearing, the appeal has been contested on behalf of Batuk Prasad, defendant no. 7, Har Kishan Das, Jai Kishan Das, Balkishan Das, Brijjiwan Das, Udai Karan Das and Jagmohan Das, respondents nos. 29 to 32, Parshotam Joshi, defendant no. 3 and Mahant Somvar Giri, defendant no. 33.

During the pendency of the appeal some defendants respondents died and their legal representatives were not brought on the record. The appeal abated against

them. The details of such defendants respondents and the property claimed against them are given below :

| No. of defendant | Name of the defendant | Details of property | 1956 MAHANT PAR- SHOTTAM GIR v. MAYANAND GIR Dayal, J. |
|------------------|---|--|--|
| 4 | Mt. Prakash | Item no. 5, Schedule , house no. 10/44-D, mohalla Bara-deo, Banaras. | |
| 5 | Goshain Lal Giri | Item no. 20, Schedule 3, house no. 10/45D, mohalla Bara-deo, Banaras. | |
| 26 (b) | Bishnath | Item no. 2, Schedule 3, house no. 27/68D, mohalla Misir Pokhra, Banaras. | |
| 26 (c) | Jagannath | | |
| 27 | Sashi Bhushan Shahi | Item no. 3, Schedule 3, house no. 47/84D, mohalla Misir Pokhra, Banaras. | |
| 28 | Shrinati Mahadei | Item no. 4, Schedule 3, house no. 47/106 Misir Pokhra, Banaras. | |
| 36 | Beni Prasad Singh | Item no. 13, Schedule 4, land of village Phulwaria. | |
| 37 | Hori Lal | Item no. 17, Schedule 4, Mauza Bara Gaon, Seom. | |
| 38 | Sukhdeo Naswar | Item no. 47, Schedule 4, mauza Khandhiapur. | |
| 39 | Rao Ram Harakh Misra, though noted as Ram Rikh Misir in the plaint. | Item no. 57, Schedule 4, cultivatory holdings in village Bamhi Bhujanta. | |

It follows that the properties abovementioned are no more subject of this decision. The plaintiff's suit for the recovery of these properties was dismissed by the court below and so much of the decree in view of the abatement of the appeal against those defendants will stand unaffected.

The learned counsel for the contesting defendants respondents and for the plaintiff have not pressed their contentions with respect to certain issues which were decided against them respectively. Such issues are issues nos. 7, 11, 13, 14, 15, 21, 22, 23 and 26.

The finding on issue no. 17 by the court below is that the suit was not maintainable against defendants 8,

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9A to 9C, 17, 19, 26A to 26C and 35A to 35C as the plaintiff had not been properly presented against those defendants, the original defendants nos. 8, 9, 17, 19, 26 and 35 being dead before the institution of the suit.

It is contended for the appellant that even though the suit was improperly instituted against persons who were dead, the suit against the heirs impleaded subsequently was not bad, it being instituted within limitation against them on the date they were brought on the record as heirs. The names of the defendants 9A to 9C have been deleted under the orders of the Supreme Court. Defendant no. 26A died. His heirs defendants nos. 26B and 26C also died subsequently, and the appeal has abated against them. It is, therefore, not necessary to consider the question of limitation in respect of defendants 9A to 9C, 26B and 26C.

The finding on issue no. 18 by the court below is that the suit was time-barred against defendants 6A to 6C, 17 to 19 and 27, as it was instituted more than 12 years after the dates of the execution of the sale deeds challenged. This finding is contested for the appellant. The suit has abated against defendant no. 27.

We are, therefore, concerned with the question of limitation with respect to the case against defendants 6, 8, 17 to 19 and 35A to 35C. It is contended for the appellant that the limitation for instituting the suit would be reckoned from the date Mayanand Gir ceased to be Mahant, that he ceased to be Mahant either from the 29th of June, 1925, when he married or from the date of the judgment of the Supreme Court, which finally held that he ceased to be a Mahant on account of his misconduct and that, therefore, the suit against all these defendants was within time. The contention for the defendants is that limitation for instituting a suit against them for obtaining possession of property transferred by a Mahant not as math property but as personal property would start from the date of the transfers challenged. We agree with the contention for the contesting respondents in view of the provisions of the Indian

Limitation Act in force on the date of the institution of the suit. 1956

In *Gananasambanda Pandara Sannadhi v. Velu Pandaram* (1) it was held that the sales of hereditary right of management of the endowed property by hereditary trustees of a religious endowment were null and void in the absence of a custom among them and that the possession taken by the purchaser was adverse to the vendors and those claiming under them. Persons having a right of management only are not competent to transfer such a right by lease or sale. The vendees could not, therefore, be in possession of any legal right and must consequently be held to be in possession of the office and property adversely to the rightful holder of the office from the date of sale. This case is, therefore, not of much help.

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In *Damodar Das v. Adhikari Lakhan Das* (2) the facts were that a controversy between the two *chelas* of a deceased mahant as to the right of succession to the maths and the property annexed to them was settled by an arrangement embodied in an *ikrarnama* by which the Math at Bhadrak was allotted in perpetuity to the elder *chela* and his successors, while the Math at Bibisarai and the properties annexed to it were allotted to the younger *chela* and his successors, for the purposes connected with his Math, subject to an annual payment of Rs.15 towards the expenses of the Bhadrak Math. A suit was instituted by the representative of the elder *chela* against the representative of the younger *chela* for recovery of certain properties situate at Bibisarai on the allegation that those properties were debottar property, dedicated to the worship and service of the plaintiff's Thakur, and held by the defendant as an *adhikari* in charge of the subordinate Math of Bibisarai. Their Lordship held that the learned Judges of the High Court were right in holding that from the date of the *ikrarnama* the possession of the junior *chela*, by virtue of the terms of that *ikrarnama*, was adverse to the right of the idol and of the senior *chela*, as representing that idol, in whom the property vested

(1) (1899-1900) L.R. 27 I. A. 69 (2) (1909-1910) L.R. 37 I. A. 147.

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in point of law that, therefore, the suit was barred by limitation.

This is not really a case of transfer of Math property by a Mahant or trustee. The rival claimants to succession to two maths entered into an agreement by which each was allotted one Math and property annexed to it. None asserted any title to the other's Math and its properties, nor admitted the other's title to his own Math and properties. The possession of each, therefore, was clearly adverse to the other from the date of the agreement. This case is, therefore, distinguishable from the cases relating to leases or sales of Math property to Mahants or trustees.

In *Vidya Varuthi Thirtha v. Balusami Ayyar* (1) the facts were that the second plaintiff was granted a permanent lease in 1891 by the then *matathipathe*. The lessor died and was succeeded by Samudra as Mahant, who also died in 1906. On his death, defendant no. 26 became the head of the Math. The second plaintiff, the lessee, sub-leased the lands in 1902 to defendants 1 and 2 for a period of ten years. In 1905 the second plaintiff, the lessee, and his son, the third plaintiff, assigned their right and interest in the lands in suit to the first plaintiff. Defendants nos. 1 and 2 before the expiry of their sub-lease in 1912 obtained another lease for 17 years from the representative of the Dewan of the Mysore State, which got into the management of the Math in 1905 under a power of attorney executed by Samudra and his successors. Plaintiffs 1 to 3 instituted that suit in 1913 against the various defendants, including the *matathipathe*, for a declaration of title and for ejectment of the *matathipathe* and defendants 1 and 2 holding possession under him, and for possession. It was argued that the second plaintiff acquired title by 12 years adverse possession in view of Article 144 of the Indian Limitation Act. In considering the question when the possession of the second plaintiff became adverse, it was observed by their Lordships of the Privy Council :

"He (i.e. the second plaintiff) was let into possession by Mahant no. 1 under a lease which

(1) (1920-1921) L.R. 48 I. A. 302

purported to be a permanent lease, but which under the law could endure only for the grantor's lifetime. According to the well settled law of India (apart from the question of necessity which does not arise here), a Mahant is incompetent to create any interest in respect of the Math property to endure beyond his life. With regard to Mahant no. 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. The receipt of rent was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life, and can, therefore, only be properly referable to a new tenancy created by himself. It was within his power to continue the tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death."

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This decision holds that a transfer made by a Mahant by way of a lease cannot endure after the transferor ceased to be the Mahant and that, therefore, the possession of the transferee cannot be adverse to the transferor till he ceased to be the Mahant, even though the Mahant had no authority to execute a permanent lease, which in view of the terms of the lease was to endure after the transferor would cease to be a Mahant. It was not said in this case that a permanent lease executed by a Mahant was void *ab initio*.

In *Subbaiya Pandaram v. Mahant Mustapha Maracayar* (1), the question of limitation again arose in a suit by the trustee of endowed property against a purchaser under an execution sale in execution of a decree against the plaintiff's father, the then trustee, for debts incurred by him. The execution sale was confirmed on the

(1) (1922-23) L. R. 50 I. A. 295.

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11th August, 1898. The suit was instituted on 23rd July, 1913. It was held by their Lordships of the Judicial Committee that whatever period of limitation be assigned the full period had run before the suit was instituted. It was argued that the period of limitation began to run afresh as each new trustee succeeded to the office. Reliance was placed on the cases reported in *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* (1) and *Vidya Varuhi Thirtha v. Balusami Ayyar* (2). Their Lordships did not agree with the contention and observed with reference to those cases :

"In each case they relate to the effect of an attempt on the part of a trustee to dispose of the property by a permanent mukurrari lease. This he has no power to do, though he is at liberty to dispose of it during the period of his life and a grant made for a longer period is good, but good only to the extent of his own life interest. It follows, therefore, that possession during his life is not adverse and that upon his death the succeeding trustee would be at liberty to institute proceedings to recover the estate, and the statute would only run against him as from the time when he assumed the office. Such an argument has no relation to the case where, as here, property has been acquired under an execution sale and possession retained throughout. Their Lordships are, therefore, of opinion that this suit is barred either under Art. 134 or 144 of Sch. I to the Indian Limitation Act."

It follows from this case that the possession of the transferee under any kind of grant—lease or sale—is not adverse to the trustee granting it till he holds that status, as possession was taken with the consent of the trustee and would be adverse to the new trustee from the time he assumes office. This case has been so interpreted in

(1) (1909-1910) L. R. 38 I. A., 76. (2) (1920-1921) L. R. 48 I. A. 302.

Mahanthram Charan Das v. Naurangi Lal (1), *vide* observations at pages 131-132 :

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"It will be observed that the statement is in no way confined to the grant of a lease, but covers the case of a purported out-and-out grant of the property. Whatever the intended duration of the attempted grant may be, it is good, but good only for the limited period indicated."

Still their Lordships held the possession of the vendee at the auction sale to be adverse from the date of the execution sale. They did not consider that there was much difference between an execution sale and a sale by the trustee himself, as they further observe :

"This is not, in fact, a transfer by the trustee himself for a valuable consideration, though there is little difference in principle between a transfer under an adverse execution and a sale by the trustee himself but disregarding that article, Art. 144 covers the exact case."

The basis for holding possession adverse from the date of execution sale must then be that property was sold as personal property of the judgment-debtor who happened to be the trustee and the purchaser in no way acknowledged the title of the trust to the property and, therefore, remained in possession adversely to the trust.

In *Mahanthram Charan Das v. Naurangi Lal* (1) the facts were that one R, the Mahant of a Math, executed a permanent lease in favour of N in December, 1909. In February, 1911, R executed a sale deed of the land subject to and with the benefit of the lease to one Sampat Kuer. The Mahant purported to execute each document for the expenses and necessities of the Math, implying thereby that he was dealing with Math property. It was held that neither of the documents was executed for the benefit of the Math or the deities installed therein or for legal necessity. R died in July,

(1) (1933-34) L. R. 60 I. A. 124.

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1913. One S took possession of the Math claiming to be Mahant, but surrendered all his rights to the plaintiff in 1916. The deed of surrender included the land, which was included in the earlier two documents. The suit was instituted in 1924 against the lessee, the purchaser and the husband of the purchaser claiming possession of the leased land as property appertaining to the Math. The contention that the property was personal property of R failed, and it was held that the property in suit appertained to the Math. The second contention that the suit was barred by the Limitation Act also failed at the trial and the suit was decreed. The High Court holding that the suit was barred, allowed the appeal and dismissed the suit. The question considered by their Lordships was whether the possession of the relevant defendant became adverse to the Math or to the Mahant as representing the Math at the date of the relevant assurance or at the date of the death of R. Their Lordships observed at page 130 :

"In other words, a Mahant has power (apart from any question of necessity) to create an interest in property appertaining to the Math which will continue during his own life, or to put it perhaps more accurately, which will continue during his tenure of office of Mahant of the Math, with the result that adverse possession of the particular property will only commence when the Mahant who had disposed of it ceases to be Mahant by death or otherwise.

If this be right, as it must be taken to be, where the disposition by the Mahant purports to be a grant of a permanent lease, their Lordships are unable to see why the position is not the same where the disposition purports to be an absolute grant of the property; nor was any logical reason suggested in argument why there should be any difference between the two cases. In each case the operation of the purported

grant is effective and endures only for the period during which the Mahant had power to create an interest in the property of the Math."

This means that the possession of a transferee by a Mahant under an absolute grant, that is, a sale deed or a gift deed, would not be adverse as the Mahant had the power to put in possession any person for the duration of his life and to empower such person to enjoy the usufruct therefrom. It matters not what is the nature of the transaction between the Mahant and the transferee. The possession of the transferee would be related to such a transfer by the Mahant as was within his power to execute. This takes into consideration that the transferee is not to suffer for any excess in the exercise of his rights by the Mahant and that the Mahant should be forced to part with such benefits in the property to the transferee as were in his power to transfer. In effect, an invalid transfer of larger rights is held to be a valid transfer of smaller rights, which transfer could be legally made by the transferor. It is to be noticed that in this case the transfers executed by the Mahant purported to be transfers of Math property as such and not as his personal property.

In *Mahadeo Prasad Singh v. Karia Bharti* (1) *R.*, a Mahant, entered into a compromise with *K* in 1904. The compromise assigned to *K* two villages Kanchanpur and Pathkauli and also the building of the Math situated at Kanchanpur. *R* continued to be the Mahant and to be in possession of the remaining property, including the village of Saktni and the Math. Thereafter *K* lived in the building of the Math at Kanchanpur and *R*, the real Mahant, resided elsewhere. Both *R* and *K* were given the power to alienate the property allotted to them without any objection by the other. *K* alienated both the villages allotted to him and *R* also transferred certain properties including the village Saktni. *R* died in 1916. *K* instituted the suit in 1926 for the recovery of possession of village Saktni which was sold by *R* in 1914. The

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(1) (1934-35) L. R. 62 I. A. 47.

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defendants contended that the suit was barred by limitation in view of Article 144 of the Limitation Act which prescribed a period of 12 years from the date when the possession of the transferee became adverse to the Math. They contended that *R* ceased to be a Mahant in 1904 when the scheme was arrived at and thereafter held the property adversely to the institution. Their Lordships of the Privy Council held that the mere fact that the compromise purported to confer upon each other an unrestricted power of alienation in respect of the endowed property did not change the character of *R*'s possession which started as a Mahant. The sale in favour of the defendants was alleged by *R* to be for providing money to discharge the debts which *R* had contracted for protecting the other property appertaining to the Math. He did not repudiate the title of the Math and did not allege that he was holding the property on his own behalf. Their Lordships of the Privy Council distinguished the case reported in *Damodar Das v. Adhikari Lakhan Das* (1) on the ground that it related to an assignment of the Math as well as its properties, that such an assignment was void and would in law pass no title with the result that the possession of the assignee was adverse from the moment of the attempted assignment, while there was no assignment of the religious institution itself to *R*, nor was there any other void transaction in his favour to render his possession adverse.

They held that the sale in suit was voidable and that the period of limitation for the recovery of the village did not begin to run until the death of *R* in 1916.

The last case referred to in this connexion is *Mahant Sudarsan Das v. Mahant Ram Kripal Das* (2). In this case their Lordships were considering the applicability of Article 144 of the Indian Limitation Act to the case before them, which was for the setting aside of an execution sale of a Math property after they had held that Articles 134, 134-A and 134-B of the Limitation Act did not cover the case, as an execution sale could not be taken to be a transfer by a previous manager for a valuable

(1) (1909-1910) L. R. 37 I. A. 147. (2) (1949-1950) L. R. 77 I. A. 42.

consideration. They also held that the limitation did not start from the death of the Mahant but from the date of the sale. Their Lordships observed in the course of their judgment that the decision in *Mahadeo Prasad Singh v. Karia Bharti* (1) had nothing to do with the sale in execution, and after referring to the cases *Subbaiya Pandaram v. Mahant Mustapha Maracayar* (2) and *Mahant Ram Charan Das v. Naurangi Lal* (3) held that where land devoted to charitable purposes was sold under an execution decree against the trustee of the charity, the ensuing possession of the purchaser was adverse from the date of sale.

It appears to us, therefore, that whenever property belonging to the Math is sold in execution of a decree which is on account of a claim against the Mahant personally and not in connexion with the purpose of the Math or when the property is sold by the Mahant alleging it to be his personal property for purposes not connected with the Math, the date from which adverse possession of the purchaser would begin would be the date of sale, and not the date when the transferor-Mahant ceased to be the Mahant of the institution. It is only when the transferor-Mahant transfers the property under a sale deed alleging it to be the property of the Math and purporting to sell it for the purposes of the Math, that the adverse possession would begin after the Mahant ceased to be the head of the institution, as the possession of the vendee-transferee up to the date of cessation of such interest by the Mahant could be legally associated with the conveyance of a lesser right by the Mahant, that is, the right of leasing the property during his lifetime and no question in the circumstances of assertion of adverse title could ensue.

This view finds support from the cases reported in *Venkatasubramania v. Sivagurunatha* (4), *Alam Khan Sahib v. A. L. M. Karupannaswami Nandan* (5) and *Sm. Hemanta Kumari v. Iswar Sridhar Jew* (6).

(1) (1934-1935) L. R. 62 I. A., 47.

(3) (1933-1934) L. R. 60 I. A. 124.

(5) A. I. R. 1938 Mad. 415.

(2) (1922-1923) L. R. 50 I. A. 295.

(4) A. I. R. 1938 Mad. 60.

(6) (1945-46) 50 C. W. N. 629.

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[The judgment then proceeds to deal with the evidence]

In view of the above we are of opinion that Maya Nand Gir's Appeal no. 557 of 1930 should fail as the property held by the court below to be Math property had been rightly so held. We, therefore, dismiss this appeal with costs.

Parshottam Gir's Appeal no. 523 of 1933 is dismissed with costs against Bhut Mukerji, who now represents Shrimati Usha Devi, original defendant no. 8, Nate and Mahadeo defendants nos. 17 and 18, Shrimati Mangal Bahu, Shrimati Savitri Bahu and Panda Gauri Shankar, who now represent original defendant no. 6, and Firm Amarchand Murli Dhar, the transferee of defendant no. 6 and who are also the legal representatives of Parshottam Joshi, original defendant no. 3. It is also dismissed with costs against Shrimati Bisheshari Devi, who represents Pt. Beni Ram and Shrimati Naraini Devi, original defendants nos. 43 and 44. It is also dismissed with costs against Mahant Somver Giri, defendant no. 34.

The appeal is allowed with costs throughout against Mayanand Gir, defendant no. 1, Sanatan Dharma Vidalya, Kashi, defendant no. 2, Radha Mohan, Gur Charan and Jagannath Prasad who now represent Batuk Prasad, original defendant no. 7, Marwari College, Banaras, which was impleaded in place of defendants nos. 10 to 13, Vishwanath Prasad and Mahadeo, defendants nos. 15 and 16 respectively, Vidya Bhushan who represents Bhagwan Datt Joshi, defendant no. 20, Shrimati Sita, Hira Singh and Brij Behari Lal who represent Tilak Chand, Ram Saran, Lachchmi Chand, Atma Ram and Hukam Chand, original defendants nos. 21 to 25, Bal Kishan Das, Brij Jeewan Das and Girdhar Das who represent Har Kishan Das, Jai Kishan Das and Udai Karan Das, defendants nos. 29 to 31 respectively, Jagmohan Das, defendant no. 32, Bhagwati Upadhya and Raghunath Upadhya who represent Vishwanath Upadhya, defendant no. 35, Brij Lal Misir, defendant no. 40, Kali Charan Pande, defendant no. 41, and Kalipado Banerji, Bistupado Banerji, Umapado Banerji and Sheopado Banerji who represent Shrimati

Lachchmimoni Devi, defendant no. 42, with the result that the plaintiff's suit for possession and occupation of the Math and its property is decreed against Mayanand Gir, defendant no. 1. The plaintiff's suit for possession is decreed against the others with respect to the property which is in their possession on the basis of transfers made by Mayanand Gir, defendant no. 1 and the plaintiff's suit for mesne profits is decreed for Rs.2,472-6 against Radha Mohan, Gur Charan and Jagannath Prasad, representatives of Batuk Prasad, defendant no. 7, for Rs.1,440 against the Marwari College, Banaras, and for Rs.142 against Kalipado Banerji Bistupado Banerji, Umapado Banerji and Sheopado Banerji, representatives of Shrimati Lachchmimoni Devi, defendant no. 42.

The plaintiff appellant is also granted a decree for future mesne profits up to the date of the recovery of possession against the respondents against whom the suit for possession has been decreed.

Appeal allowed.

APPELLATE CIVIL

*Before the Honourable O. H. Mootham, Chief Justice,
and Mr. Justice Srivastava*

RAMLAL RAJARAM (APPELLANTS)

v.

MESSRS. G. D. MEHROTRA AND COMPANY AND OTHERS
(RESPONDENTS)

Constitution of India, 1950, Art. 226—Guiding principles to grant relief—No effective relief possible—No direction or order to be issued.

In deciding what relief can be granted to a petitioner under Art. 226 of the Constitution in the circumstances of a particular case the Court is to be guided by the "broad and fundamental principles", which regulate the grant of writs in English Law.

It is not open to a party to say that if a writ cannot be granted, a direction or order should be made. Where no effective relief under Art. 226 can be granted, the petition is liable to be dismissed.

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Special Appeal No. 68 of 1957, from a decision of MEHROTRA, J., dated 14th March, 1957, in Civil Misc. Writ No. 3069 of 1956.

The facts appear in the judgment.

R. S. Pathak and *Tej Narain Sapru* for the appellant.

G. N. Kunzru, *Amarnath Kaul* and *Kamta Nath Seth*, for the respondents.

The judgment of the Court was delivered by—

SRIVASTAVA, J.:—This is a respondent's appeal against an order of a learned Single Judge of this Court by which he quashed two orders of the District Judge, Varanasi, dated the 1st of October, 1956, and directed that the respondent to the petition must give effect to two previous orders of the District Judge, dated the 3rd of September, 1956, and the 6th of September, 1956.

The facts of the case so far as they are material for this appeal may be briefly stated. There was a limited company known as the Banaras Cotton & Silk Mills Ltd., Banaras. In the first week of May, 1955, it was ordered by this Court to be compulsorily wound up. The case was then transferred under section 164 of the Indian Companies Act (Act VII of 1913), to the District Judge of Banaras. He appointed three persons—*Sri C. D. Parikh, Advocate*, *Sri Raghav Ram Varma, Advocate*, and *Sri B. L. Tandon, Chartered Accountant*—(impleaded in this appeal as respondents nos. 3 to 5 and in the petition as respondents nos. 2 to 4 and hereinafter referred to as the liquidators)—as Official Liquidators of the company that had been ordered to be wound up. In February, 1956, under the directions of the District Judge an advertisement was published in the papers inviting tenders for taking the mills on lease. Tenders were submitted, but none was found to be acceptable. A fresh advertisement inviting further tenders was then published and in response to it four tenders were received, including one by Messrs. G. D. Mehrotra and Company, the petitioner, (who is now respondent no. 5 and will herein after be referred to as the respondent), and one by Ramlal Raja Ram, the appellant, (who was

impleaded as respondent no. 5 in the original petition and will hereinafter be referred to as the appellant). The respondent offered to pay a monthly rental of Rs.22,500, but later on submitted by way of clarification that in addition he would be prepared to pay some amount for the depreciation of the mills as and when determined by the Income-tax Officer. The appellant offered to pay Rs.28,000 per month as rent in respect of the weaving section of the mills only. On the 2nd of June, 1956, the appellant's tender was accepted under the directions of the District Judge and he further directed the liquidators to execute a lease in favour of the appellant within fifteen days. He, however, provided that liability to pay the rent was to begin two months after the date of the execution of the lease, or two months after obtaining the Tex Mark licence, whichever date was later. The obtaining of the Tex Mark licence was necessary before the working of the weaving section of the mills could be started. For certain reasons, including differences about some of the terms of the lease, the lease in favour of the appellant could not be executed though the period of 15 days which was originally granted for the purpose was extended several times, and the liquidators started negotiations with the respondent so that he may, if he liked, revise the terms of his offer and make them more favourable to the mills. The respondent did this on the 18th August, 1956. On the 3rd of September, 1956, the District Judge finally ordered that if the appellant did not get the lease executed in his favour within two days, the lease would be given to the respondent on the terms and conditions entered in the order of that date. He further ordered that in case the lease in favour of the respondent did not materialize, steps were to be taken for the sale of the mills. The respondent was required to deposit two months' rent in cash by way of security. On the 6th of September, 1956, the respondent pointed out to the District Judge that the two days period granted to the appellant for getting the lease executed in his favour had expired and that he was no longer entitled to have

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the lease made in his favour. The respondent prayed that the lease be granted in his favour as ordered on the 3rd of September, 1956, and that the liquidators be directed to hand over possession to him. This request of the respondent was accepted by the District Judge on the 6th of September, 1956, and he ordered the liquidators to lease out the mills to the respondent and to put him in possession. On the same date the liquidators wrote to the respondent, requiring him to get the lease executed and to take possession over the mills. Possession over five godowns and a part of the office of the mills was handed over to the respondent on the same date. According to the liquidators, this was done, because the respondent insisted that it being a very auspicious day, the delivery of possession must be started on that date. The respondent, on the other hand, contends that as possession had been directed to be delivered to him, the delivery of possession was started in ordinary course on that very date. Thereafter disputes arose between the respondent and the liquidators on several points, including the preparation and verification of the lists of properties over which possession was to be delivered, the settlement of the terms of the lease and the final approval of the draft lease. The respondent had, however, in compliance with the orders of the District Judge, deposited a sum of Rs.57,000, on account of two months' rent, with the liquidators. On the 18th September, 1954, the respondent applied to the District Judge, pointing out that he had complied with the conditions imposed in the order of the 3rd September, 1956, and had even purchased the requisite general stamp for the execution of the lease. He prayed that the liquidators be directed to execute the lease in his favour. In reply the liquidators pointed out that they had not up till then been able to ascertain either the financial condition, or the business reputation of the respondent, nor had they been able to ascertain to their satisfaction whether "G. D. Mehrotra and Co." was a one-man concern or whether it was a firm, registered or unregis-

tered, or a private limited company. They prayed that the respondent be directed to give proper safeguards regarding the properties that were to be put in his possession and provided a sufficient guarantee for the payment of the rent. The District Judge then ordered that the respondent should "satisfy the liquidators about his financial position before the lease is to be executed and the mills are handed over to them". He directed the liquidators to get in touch with the respondent for this purpose and to submit a report to him. He extended the 15 days' time previously granted to the respondent for the execution of the lease by ten days more. Attempts were then made by the liquidators to ascertain the financial position, and the extent of the business experience of the respondent and also to find out his status, i.e., whether G. D. Mehrotra and Company was a single-man concern, or whether it was a registered or unregistered firm or a private limited company. In this connexion the liquidators referred to the banks named by the respondent and wrote to the respondent himself. According to the liquidators, the attitude of the respondent was unresponsive and the plea he took was that the liquidators had no right to raise the question of his financial status at that stage and that without making any further fuss they should execute the lease in favour of the respondent as directed by the District Judge. Ultimately, on the 1st of October, 1956, the liquidators submitted a report to the District Judge, in which they pointed out that in spite of the attempts they had made, they had not been able to ascertain the financial status of the respondent or facts relating to his business experience. In that report they said that they had learnt that Messrs. G. D. Mehrotra and Co. was a partnership firm, which had no banking account and that in the circumstances they were unable to recommend that the lease should be executed in favour of the respondent and that in their opinion it would be highly detrimental to the interests of the creditors, share-holders and workers, if the properties and assets of the company

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were handed over to the respondent or a lease was executed in his favour. They recommended that the orders, dated the 3rd of September, 1956, and the 6th of September, 1956, be modified and that they be permitted to return the security money deposited by the respondent to him. They pointed out that in the order of the 3rd of September, 1956, they had been directed to take steps for the sale of the mills in case the lease did not materialize and sought directions in the matter. A copy of this report of the liquidators was given to the counsel for the respondent and when the report came up before the District Judge for consideration on the 1st of October, 1956, the liquidators as well as the counsel for the respondent were present. The counsel addressed some arguments to the court, but then prayed that time be given to him for contacting his client for instructions. This request was not granted and the learned District Judge proceeded to make the first of the two orders passed on the 1st October, 1956, the validity of which was challenged by the appellant in the writ petition out of which this appeal has arisen. In that order after referring to the report of the liquidators and the events that had preceded it, the learned District Judge said that he was not satisfied "that the respondent was a party of substantial means, who may be entrusted with the mills which is valued in the neighbourhood of several lacs. It is also doubtful if Messrs. G. D. Mehrotra and Company has any experience of the running of the textile mills." He felt that any further delay in the disposal of the question of lease would be highly detrimental to the interest of liquidation. He, therefore, amended his orders, dated the 3rd of September, 1956, and the 6th of September, 1956, and directed the liquidators not to lease out the mills to the respondent. The sum of Rs.57,000 which the respondent had deposited in the account of the liquidators was ordered to be returned to him. The District Judge also directed that if the respondent had been put in possession of any portion of the mills, the possession should be taken back from him. The second impugned order of the 1st of October, 1956, was then

made. By it the District Judge directed the liquidators that the mills be leased out to the appellant, who should execute the lease forthwith after getting the terms approved by the court. He directed the liquidators to hand over possession to the appellant in accordance with the terms approved by the court. On the same date a draft lease in favour of the appellant was submitted by the Official Liquidators to the District Judge for approval and was duly approved. At the request of the liquidators the appellant deposited a sum of rupees one lac in the account of the liquidators. This amount included Rs.57,000 as security for two months' rent and Rs.43,000 in lieu of a bank guarantee. The lease was thereafter duly executed. The lessee and two of the liquidators signed it on the 1st of October and the third liquidator signed it on the 2nd. Possession over the various parts of the mills was also handed over to the appellant on the 2nd of October, 1956, with the exception of the five godowns that were already in the possession of the respondent.

The 3rd and the 4th of October were holidays. On the 5th of October, 1956, the respondent filed his writ petition in which he claimed the following reliefs :

- (1) Issue of any suitable order, direction or writ, including a writ in the nature of a certiorari, and quash the orders of the District Judge, Banaras, dated the 18th September, 1956, and the 1st of October, 1956, and the lease alleged to have been executed on the 1st of October, 1956, in favour of Ramlal Raja Ram.
- (2) Issue a suitable direction, order or writ, including a writ in the nature of *mandamus*, directing the District Judge of Banaras to execute a lease on the terms and conditions contained in his order, dated the 3rd September, 1956, in favour of the petitioner and to deliver possession of the entire mills to the petitioner.

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- (3) Issue a suitable direction order or writ, including a writ of *mandamus*, directing the District Judge of Banaras to take back possession of any portion of the mills that may have been delivered to Ramlal Raja Ram.
- (4) Issue a suitable direction, order or writ in the nature of *mandamus*, directing the District Judge not to disturb the possession of the petitioner over that portion of the mills in respect of which possession had been delivered to the petitioner.
- (5) Issue any suitable interim order, direction or writ, including a writ in the nature of *mandamus*, for the pendency of this petition not to give effect to the lease alleged to have been executed in favour of Ramlal Raja Ram and to maintain the *status quo*.
- (6) Grant any other or further relief which may be considered just and convenient in the circumstances of the case.
- (7) Award costs of this petition to the petitioner.

The petition was admitted and an interim order was passed that the *status quo* be maintained. Thereafter an application was made on behalf of the appellant, pointing out that the lease in his favour had been executed before the petition was filed and praying that its registration may be permitted. Permission was granted and the lease was duly registered.

When the petition came up for disposal the main contentions urged on behalf of the respondent were :

- (1) That the order of the 1st of October, 1956, by which the learned District Judge had practically cancelled his previous orders, dated the 3rd of September, and the 6th of September, 1956, in favour of the respondent really amounted to a review of the previous order and had been made without jurisdiction as the District Judge had no

power of review either under the provisions of the Indian Companies Act or otherwise.

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- (2) That a "completed contract" for the execution of the lease in favour of the respondent had come into existence between the liquidators and the respondent and in part performance of the same the respondent had deposited two months rent in advance, purchased stamps for the execution of the lease deed and had even been put in possession of a part of the property to be leased out. All this had been done on the basis of the sanction granted by the District Judge for the lease being executed in favour of the respondent. The District Judge had, therefore, no power to recall the sanction and to sanction the lease in favour of the appellant.
- (3) That in any case the principles of natural justice had been violated as the respondent had not been given the hearing that was due to him before the impugned orders of the 1st of October, 1956, were passed.
- (4) That the liquidators had really acted *mala fide*. They had misrepresented facts to the District Judge and had even suppressed material facts in order to obtain an order cancelling the execution of the lease in favour of the respondent and sanctioning the lease in favour of the appellant. The order of cancellation was, therefore, liable to be quashed.

Three preliminary objections were raised against the petition on behalf of the appellant. They were :

- (1) That the orders of the District Judge, dated the 1st of October, 1956, were really administrative or executive orders. They were not judicial or quasi-judicial orders.

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Tey could not, therefore, be interfered with under Article 226 of the Constitution.

- (2) That, alternatively, the respondent had other adequate remedies equally speedy and efficacious. If the orders of the 1st of October were really judicial or quasi-judicial orders, he would have gone up in appeal against them. If the respondent's contention was correct and there was a "completed contract" in his favour which could be specifically enforced, it was open, the respondent to approach the regular civil court for the enforcement of the contract. These alternative remedies being available, it was not open to the respondent to invoke the jurisdiction of the High Court under Article 226 of the Constitution.

- (3) The writ jurisdiction of the High Court was not meant for enforcing contractual rights. Before the petition had been filed, rights of the appellant had come into existence. A lease had actually been executed in his favour and he had been put in possession of the property. The lease could not be quashed in writ proceedings, nor was it possible in these proceedings to dispossess the appellant and to put the respondent in possession of the mills. None of the reliefs claimed by the respondent in the petition could in the circumstances be granted by the Court.

So far as the case of the respondent on merits was concerned, the objections taken were :

- (1) The order of the 1st of October, was not in fact an order reviewing the previous orders of the 3rd and the 6th of September. A court has inherent power to correct its own mistakes and of recalling the orders which had been passed by it in ignorance of the

full facts. The District Judge felt that he had passed the previous orders of the 3rd and the 6th of September without having all the necessary facts before him. When these facts were brought to his notice, he thought that the sanction previously granted by him in respect of the lease in respondent's favour should not have been granted. He, therefore, withdrew the sanction and granted a sanction in favour of the appellant.

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- (2) There was in fact no "completed contract" in favour of the respondent. The liquidators and the respondent had never agreed either about the terms that were to be entered in the lease deed or about the identity of the person in whose favour the lease was to be made. The sanction granted by the District Judge could not in law create any such right in favour of the respondent as would entitle him to maintain a petition under Article 226 of the Constitution.
- (3) The liquidators, as well as the District Judge, were bound to safeguard the interests of the share-holders and creditors of the mills. The lease in favour of the respondent could, therefore, not be sanctioned without the respondent satisfying the liquidators about his financial position, and his ability to run the mills properly. The liquidators as well as the District Judge had also to be satisfied about the actual person who was taking the lease on behalf of the respondent. When the liquidators failed on account of the attitude taken up by the respondent in obtaining the requisite information about the respondent's capability, financial standing or status, they in good faith brought all the facts to the

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notice of the District Judge and sought instructions. Taking all the facts into consideration, the District Judge modified his previous order and sanctioned the lease in favour of the appellant. There was no question of the liquidators acting *mala fide*, or of the orders of the 1st of October being improper, or without jurisdiction.

- (4) That everything which the liquidators had said in their report of the 1st of October, 1956, was fully known to the respondent before the orders of that date were passed by the District Judge. The counsel for the respondent was called and heard. There was, therefore, no question of any principles of natural justice being violated, or of the orders being passed without affording the respondent an opportunity of having his say.

The learned Judge repelled the first two preliminary objections raised by the appellant by saying that the impugned orders were really judicial or quasi-judicial orders, that they were not appealable under section 202 of the Companies Act and that a regular suit would not have afforded an equally efficacious and adequate remedy against the grievances of the respondent. He held that the existence of an alternative remedy was not an absolute bar to the maintainability of a petition under Article 226 of the Constitution. He did not deal in his judgment with the third preliminary objection.

On merits, he accepted the respondent's contention that the first order of the 1st October, 1956, really amounted to a review of the earlier orders of the 3rd and the 6th of September, 1956, and was without jurisdiction, as the District Judge had no powers of review under the law. He was also of opinion that the contract between the liquidators and the respondent for the execution of a lease in favour of the latter had really

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become complete after the sanction had been granted by the court, and as the sanction has been granted by the court, and as the sanction had been withdrawn, it had affected the rights of the respondent so as to entitle him to seek relief under Article 226 of the Constitution. The respondent, having performed his part of the contract and having been put in possession of a part of the property, could, according to the learned Judge, take advantage of the doctrine of part performance and had been wrongly deprived of his rights by the cancellation of the order sanctioning the lease in his favour. The learned Judge further went on to hold that the liquidators had no right to raise questions of the financial stability, status or capability of the respondent at the stage at which they sought to raise them, that the financial position of the respondent was in no way unsatisfactory and the company would not have suffered in any way had the lease been granted in favour of the respondent, that the sanction in favour of the respondent was cancelled on inadequate grounds without giving the respondent an opportunity to be heard. He did not consider it necessary to go into the allegation of *mala fides* made against the liquidators as, in his opinion, even if the liquidators had acted in good faith, the District Judge was in no way justified either in withdrawing the order in favour of the respondent, or in sanctioning the lease in favour of the appellant. He, therefore, set aside the impugned orders and directed the District Judge, the liquidators as well as the appellant to give effect to the earlier orders of the District Judge, dated the 3rd and the 6th of September, 1956.

The appellant has now come up in appeal, and though no less than 41 grounds are set forth in the memorandum of appeal, the pleas which his learned counsel has urged before us are substantially those which had been pressed before the learned Single Judge, but had not found favour with him.

It was stressed on behalf of the appellant that the third preliminary objection raised against the petition

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was really fatal to it and deserved more serious consideration. That objection alone was enough for the rejection of the petition, even if the decision of all the other questions raised was assumed to be in favour of the respondent.

Briefly put, the argument in connexion with the aforementioned objection is this. It is established beyond doubt that before the petition was filed a proper lease in respect of the mills had been executed by the liquidators and the appellant. The appellant had also been put in possession of almost the entire property leased out. After the petition was filed an order was obtained that the *status quo* be maintained. That order could not, however, affect either the lease which had already been made or the possession which had been handed over to the appellant. Subsequently the lease was allowed by the court to be registered and the registration related back to the date of its execution. The appellant could, therefore, claim to be in actual possession of practically the entire property on the basis of a valid lease properly executed and registered. The utmost, which the respondent could claim, was that before the lease had been made in favour of the appellant, the liquidators, with the sanction of the court, had entered into a "completed contract" with the respondent for the grant of a lease in his favour and some of the terms of the contract had been complied with by the parties to it. The only right which respondent could claim in that connexion was the specific enforcement of the contract. The extraordinary remedies contemplated by Article 226 of the Constitution were, however, not meant for the enforcement of contractual obligations. It was not open to the respondent under that Article of the Constitution either to have the lease in favour of the appellant quashed, or to have a lease executed in his own favour by the liquidators. The respondent could also not claim in a proceeding under that Article that the appellant should be dispossessed, or that the respondent himself should be put in possession. These were, however, the principal relief claimed by the respondent in the petition.

The only other relief which was claimed was a writ of certiorari quashing the orders of the District Judge of Banaras, dated the 18th September and the 1st October, 1956. By the former order, the District Judge directed the respondent to satisfy the liquidators about his financial position before the lease could be executed in his favour and the mills handed over to him. By the latter order he revoked the sanction he had granted for the lease being executed in his favour and had directed that the lease be granted in favour of the appellant. Both these orders related to matters which were in the absolute discretion of the District Judge. It was the responsibility of the court under whose supervision the liquidation proceedings were being conducted to see that the company, its share-holders or creditors did not suffer in any way by the properties of the mills being put in the possession of any improper person. It was in his absolute discretion to accord sanction to any proposal of lease of the properties of the company, or to refuse to sanction it. He had to exercise that discretion after taking into consideration the entire material that was put before him. He had no duty to act in any particular way and could not be compelled to grant or refuse the sanction in respect of any proposal. The respondent could not, therefore, invoke the powers of the Court under Article 226 of the Constitution to quash either the order directing the respondent to satisfy the liquidators about his suitability, or the order revoking the sanction of the proposal of the respondent's lease. Nor can this Court under that Article direct the District Judge to re-sanction the lease in the respondent's favour. In the circumstances none of the reliefs claimed by the respondent could be granted and the petition was really a futile one. It should have been dismissed leaving the respondent to pursue any other remedy which he may have been advised to pursue for the redress of his real or apparent grievances.

In his reply to this contention of the appellant, the learned counsel for the respondent urged four points:

- (1) The District Judge was in charge of the liquidation proceedings. He had appointed

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the liquidators. The liquidators were, therefore, his agents. For all practical purposes there was virtual identity between the liquidators and the court. Every act of the liquidators could, therefore, be deemed to be an act of the court. If the liquidators had entered into a contract to make a lease in favour of the respondent, the contract must be held to have been made by them on behalf of the court. If they had purported to execute a lease in favour of the appellant, that too must be held to have been done on behalf of the court. It was, therefore, an official act of the court and if it was invalid or improper on any account, it could be quashed by a writ of certiorari. A writ of mandamus could also be issued directing the court or the liquidators to execute the lease in favour of the respondent.

- (2) If the appellant had somehow succeeded in obtaining possession of the mills on the basis of a lease, which should not have been executed in complete disregard of the respondent's rights, it is open to the Court under Article 226 of the Constitution to order the dispossession of the appellant and to direct that the respondent be put in possession. This can be done either on the ground that the appellant had been acting in collusion with the liquidators and had taken possession with full knowledge about the respondent's rights, or on the ground that something had been done which ought not to have been done and it was necessary in the interest of justice to restore the property to the person who was legally entitled to it.
- (3) Even if it be conceded for the sake of argument that what the respondent claimed

in his petition was the enforcement of a contractual obligation, there is nothing in Article 226 of the Constitution to prevent the Court in proper cases from enforcing such obligations.

- (4) Article 226 is not intended to be exhaustive, and besides those writs, which find particular mention in the Article, it is open to the Court to issue writs of other kinds, or even directions and orders which it may find necessary to issue in the particular circumstances of the case. The manner in which the respondent framed the reliefs of his petition is also immaterial. If the reliefs claimed by him cannot be granted in the way in which they had been claimed it is open to the Court to grant them in any other manner which it may find suitable in the circumstances.

The lease in favour of the appellant is now an accomplished fact. It was executed before the respondent's petition was filed and, though it was registered subsequently, the registration was done by the permission of the court and related back to the date of execution. It also appears to be beyond question that the appellant has been put in possession of the property and is working the mills in accordance with the terms of the lease. Before the lease can be cancelled or quashed on any ground, difficult and complicated questions of fact and law will have to be gone into. It appears not to be possible to decide these questions without further evidence, and in our opinion a proceeding under Article 226 is not appropriate for this purpose.

The contention that the lease in favour of the appellant can be quashed under Article 226 of the Constitution because it is an act of the court, the liquidators being its agents, appears to us to be entirely unacceptable. It is true that when a company is ordered to be wound up, the liquidation proceedings have to be conducted under the supervision of the court. The

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liquidators can be appointed and removed by the court and have to act under its control. The liquidators, however, possess a status recognized by statute which defines their powers and functions. These powers and functions are not identical with the powers and functions of the court. The mere fact that some of their powers can be exercised by the liquidators with the sanction of the court is not enough to establish an identity between them and the court. There appears to be nothing in the Indian Companies Act, 1913, (which admittedly governs the relationship between the parties to this case), to support the contention of the respondent that the liquidators are the agents of the court and that their acts can on that account be considered to be acts of the court. Liquidators may be officers of the court as they act under its directions, but, strictly speaking, they represent not the court but the company which is being wound up. Everything which they have to do has to be done in the name of the company for the safeguarding of its interests and those of its creditors and shareholders. They have to act in the name of the company and not in their own names. Provisions in the Companies Act, like sub-section (5), section 183, show clearly the untenability of the contention that the liquidators and the court are identical in any respect.

Reliance was placed by the learned counsel for the respondent on a sentence in *Lyallpur Bank Ltd. v. Manohar Lal* (1) where it was observed that—

“The Official Liquidator is merely the agent of the court for purposes of liquidation of the bank.”

What the learned Judge obviously meant, when he made the observation, was that the Official Liquidator was an officer of the court. The question in that case was whether as a result of an order of winding up of a company, decrees held by the company could be considered to have been transferred to the liquidators by assignment or by operation of law. The question as to what was the

(1) A. I. R. 1936 Lah. 152.

true relationship between the court and the Official Liquidators who had been appointed by it neither arose in the case, nor was decided in it.

We are, therefore, unable to accept the contention that the liquidators and the court were one, or that the former were the agent of the latter. The very basis of the plea that the lease in favour of the appellant could be quashed or cancelled because it was an act of the court is, therefore, gone. It is also difficult to understand how the lease can be considered to be a judicial or quasi-judicial order or decision of the court so as to be the subject of a writ of certiorari. The lease is really a transfer of interest in the property lease made by the liquidators in favour of the appellant. It is not an order or decision of any kind. The argument that it cannot be quashed under Article 226 of the Constitution, therefore, appears to be well founded.

Under section 179 of the Indian Companies Act, 1913, Official Liquidators have the power to carry on the business of the company, so far as it may be necessary for the beneficial winding up of the same, and also to do such other things as may be necessary for the winding up of the affairs of the company and distributing the assets. The exercise of the power is certainly subject to the sanction of the court. The power, however, vests in the liquidators and has to be exercised by them. The court has only to accord its sanction or to refuse the same. Even if the court sanctions a proposal made by the liquidators, under the provision the liquidators are not bound to carry it out. It is to be open to them to drop the proposal so sanctioned and to put up other proposals before the court for sanction. They cannot be compelled to act upon any proposal against their wishes, if they consider it to be contrary to the interests of the company. For instance, it is not open to the court to compel them to consent to a compromise or arrangement with a creditor or contributory : *Pearson's case* (1). Even if the liquidators do something in exercise of their powers under section 179 without the sanction of the

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court, e.g., institute a suit, or start a prosecution, the suit or the prosecution does not become non-maintainable on that account, [*vide Dr. Sailendra Nath Singh v. The State* (1) and *Dublin City Distillery v. Doherty* (2)]. The omission to obtain the sanction of the court in a matter between the court and the liquidators, and the person, against whom the suit is filed or the prosecution is launched, cannot take advantage of that omission. So far as the sanction is concerned, it is in the discretion of the court either to refuse or to grant it. If the matter rests entirely on the discretion of the court, it obviously cannot be compelled by a writ to exercise that discretion in a particular manner. A writ of certiorari is meant only to curb excess of jurisdiction, and to keep inferior courts and tribunals within their bounds. It cannot be used for the purpose of compelling a tribunal to exercise its jurisdiction in a particular manner. That is so also in the case of a Writ of Mandamus, and this is well stated by Merrill in his *Law of Mandamus*, at page 33, where the learned author says :

“Where a subordinate body is vested with power to determine a question of fact, the duty is judicial. Though it can be compelled by mandamus to determine the fact, it cannot be directed to decide in a particular way, however clearly it may be made to appear what that decision ought to be. A court will be ordered to proceed to judgment but it will not be instructed to render a particular judgment. It is said there is not a case where the King’s Bench has ordered an inferior court to render a particular judgment. When a decision has been reached in a matter involving discretion, a writ of *mandamus* will not lie to review or correct it, no matter how erroneous it may be.”

In the present case, the District Judge had in the exercise of his discretion decided that before the lease

(1) A. I. R. 1955 Cal. 29.

(2) L. R. (1914) A. C. 823.

in favour of the respondent was executed, the latter should satisfy the liquidators about his suitability. Not being satisfied on the point, the learned Judge cancelled the sanction which he had given to the proposal in favour of the respondent and sanctioned the one in favour of the appellant. What the respondent wanted by the petition under appeal was that this court should quash the orders of the District Judge and direct him to exercise his discretion in a particular manner, viz., to allow the lease to be given to the respondent without any satisfaction about his suitability and to re-sanction the lease that was proposed to be executed in his favour. He also wanted the Court to compel the liquidators to execute the lease in his favour, even though they felt that it would not be in the interest of the company to do so. It is difficult to see how all this could be done either by a writ of certiorari or by a writ of mandamus.

The lease in favour of the appellant being there, and he having secured possession of the leased property in pursuance of it, he can claim to be entitled to continue in possession as long as the lease lasts. The respondent, however, wants that the mills should be leased out to him and that he should be put in possession of them. Realizing that what the respondent wanted could not be obtained by a writ of certiorari, his learned counsel has urged that a writ of mandamus should be issued requiring the appellant to give up possession and requiring the court and the liquidators to take back possession from the appellant and to hand it over to the respondent. A writ of mandamus is not, however, in our opinion, meant for such purposes. In a recent case decided by the Supreme Court, *Sri Sohan Lal v. The Union of India* (1) a displaced person had been evicted from a certain property by the Union of India in contravention of the express provisions of section 3 of the Public Premises (Eviction) Act. After evicting him, the Union of India had put the property in the possession of another person. The person who was wrongly evicted filed a writ petition praying that the order of his eviction

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(1) A. I. R. 1957 S C. 529.

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be quashed. He also claimed a writ or order in the nature of mandamus, directing the Union of India, who had dispossessed him, to restore possession of the property to him. He also claimed a similar writ against the person, who was in possession directing him to give up possession and to put him (the evicted person) in possession. The order evicting him was quashed and the learned Judges were also of opinion that the Union of India could be directed by a writ of mandamus to put the evicted person back in possession. They, however, expressed their inability to issue any such writ against th person who was in actual possession for the purpose of dispossessing him. They laid down :

“Normally a writ of mandamus does not issue to or an order in the nature of mandamus is not made against a private individual. Such an order is made against a person directing him to do some particular thing specified in the order which appertains to his office and is in the nature of a public duty”.

They went on to observe that a writ of mandamus or an order in the nature of mandamus could have been issued against the person in actual possession only if it was established that he had colluded with the Union of India and the transaction between them was merely colourable, entered into with a view to deprive the evicted person of his right. They drew an analogy from election disputes and said :

“It would appear that so far as election to an office is concerned, a mandamus to restore, admit or elect to an office will not be granted unless the office is vacant. If the office is in fact full, proceedings must be taken by way of injunction or election petition to oust the party in possession and that a mandamus will go only on the supposition that there is no body holding the office in question A mandamus will not lie unless the election can be shown to be merely colourable.”

They, therefore, found themselves unable to—

“see why in principle there should be a distinction made between such a case and the case of a person, who has, apparently, entered into *bona fide* possession of a property without knowledge that any person had been illegally evicted therefrom”.

They, therefore, declined to issue a writ of mandamus, directing the party in possession to leave it and hand it over to the evicted person. In view of what was laid down in this case it appears to us that it is not open to this Court to issue a writ of mandamus or an order of direction in the nature of mandamus for the purpose of dispossessing the appellant or putting the respondent in possession unless it is established by the respondent that the appellant has been guilty of collusion or that his lease or possession in pursuance of it are colourable transactions. In this case, however, though it was alleged in the petition that the liquidators had acted *mala fide*, the petition and the affidavit filed in support of it do not contain even a suggestion that the appellant has acted in collusion with any one or that the lease in his favour is a colourable transaction. The allegation of collusion of the appellant is also conspicuous by its absence in the grounds enumerated in the petition in support of the reliefs claimed. When collusion or the colourable nature of the lease in favour of the appellant were not even alleged, there can be no question of their being established and relief being granted to the respondent on that basis.

It was urged, alternatively, that even otherwise this Court can order that the appellant be dispossessed and the respondent be put in possession. Support for this proposition was sought to be drawn from cases like *Mahabir Prasad v. The District Magistrate, Kanpur* (1), *Bahori Lal Paliwal v. The District Magistrate, Bulandshahr* (2) and *Central Provinces Manganese Ore Co., Ltd. v. The State of Madhya Pradesh* (3). These cases are,

(1) A. I. R. 1955 All. 501.

(2) A. I. R. 1956 All. 511.

(3) A. I. R. 1956. Nag. 34.

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however, clearly distinguishable and are of no real help to the respondent on this point. The first mentioned case was decided with reference to the U. P. Temporary Control of Rent and Eviction Act. The allotment order made by the District Magistrate under the provisions of that Act was quashed as illegal and the person put in possession on the basis of that allotment order was directed to be evicted. The Act itself contains provisions under which the District Magistrate can take steps to evict a person who takes possession without a proper allotment order. The District Judge in the present case appears to have no such powers of cancelling the lease in favour of the appellant or requiring him to give up possession of the leased property. In the second case, the resignation of the Chairman of the Town Area Committee had been accepted, though it had been withdrawn, and a new Chairman had been elected during the office being vacant. It was held that the resignation could have been withdrawn and no vacancy had really occurred as it had been wrongly accepted. When there was no vacancy, the new Chairman could not be elected to fill it. His election was, therefore, treated as null and void. There is no similarity between that case and the present one. In the third case, the petitioner had been granted by the State Government a right of dumping the spoil of his mines on some land adjoining them. Subsequently, the Government had granted a prospective licence and a lease of that land in favour of the respondent who wanted to interfere with the petitioner's right. The Government as well as the respondent were, therefore, directed by a writ of mandamus not to interfere with the petitioner's occupation of the land. The land in that case was in the possession of the petitioner and there was, therefore, no question of another person being dispossessed by a writ of mandamus. It does not, therefore, appear to be possible, in proceedings under Article 226 of the Constitution, either to order dispossession of the appellant or to direct that the respondent be put in possession of the mills.

Nor can the liquidators be directed under Article 226 of the Constitution to execute a lease in favour of

the plaintiff, even if it be assumed that there was a valid and binding contract between them and the respondent for the making of the lease. It has not been suggested that such a direction to execute the lease can be made by a writ of certiorari or prohibition. For this purpose also it is said that a writ of mandamus is the proper remedy. It is, however, well settled that a writ of mandamus cannot be issued to enforce a contractual obligation. The law is in our opinion correctly stated by FERRIS in their "Extraordinary Legal Remedies", paragraph 195, at page 229 :

"The duties enforceable by mandamus, although not necessarily public duties, are those imposed by law. Mandamus will not lie therefore to enforce a right founded purely on private contract, however clear that right may be."

The same is the view of MARRILL, who in his "Law of Mandamus," paragraph 16, page 9, observes :

"Since the object of this writ (mandamus) is to enforce duties created by law, it will not lie to enforce private contracts, unless it is extended to such cases by statutory enactment."

Before the coming into force of the Constitution, a mandamus could be issued by the High Courts in the Presidency Towns under section 45 of the Specific Relief Act. It was held in *P. K. Banerjee v. L. J. Siamonds* (1) that a mandamus could not be claimed under that section for enforcing a contractual obligation. After the coming into force of the Constitution, a writ of mandamus issueable under Article 226 of the Constitution was refused for the purpose of enforcing a contract in *Budh Mal v. Gulab Singh* (2), *Chhattar Singh v. The State of Punjab* (3) and *Indian Tobacco Corporation v. The State of Madras* (4).

(1) A. I. R. 1947. Cal. 307.
(3) A. I. R. 1953 Punj. 239.

(2) A. I. R. 1952 Raj. 151.
(4) A. I. R. 1954. Mad. 549.

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The learned counsel for the respondent, however, referred to the observations of FERRIS in the "Extraordinary Legal Remedies" on pages 353-354 and also to the case of *R. v. Bristol Rail Coy.* (1) referred to in "Halsbury's Laws of England," 3rd Edn., Vol. 11, in footnote (s) to paragraph 161 at page 86 and urged that contractual obligations could be enforced by means of writs. The view of FERRIS on the point has already been quoted. In the passage on pages 353-354 of the book to which the learned counsel refers, the authors, who are dealing with Public Service Corporations, say :

"Where the duty is imposed on a Corporation by statute or charter it may be possible to compel it by a mandamus to perform that duty. Such Corporations enter into contracts in pursuance of the statute or the charter and some authorities have held that in certain cases they may be compelled to fulfil such contracts by mandamus because a contract may also in certain circumstances impose rights and duties enforceable by mandamus."

The observations obviously do not apply to the present case because the liquidators cannot be held to have entered into any contract with the respondent in pursuance of any statute, nor can it be said that the contract imposes upon them a public duty which can be enforced by a writ.

The case of *R. v. Bristol Rail Coy.* (1) is not available to us but from the note about it on page 86 of "Halsbury's Laws of England", it appears that in that case a railway company had agreed to pay a certain amount in settlement of a claim for damages as the agreement had been made under seal which could not be enforced by action. A writ was, therefore, issued to compel the railway company to make the payment. We do not see how the case can be of any help to the respondent.

(1) (1845) 3 Ry. & Can. Cases 777

Reference was also made to two other cases, *Nur-uddin Ahmad v. State of Assam* (1) and *The State of Orissa v. Madan Gopal Rungta* (2). These cases, too, appear to be of no assistance to the respondent. In the Orissa case an interim direction had been issued directing the State of Orissa to refrain from disturbing the petitioner's possession for three months, and it was held by the Supreme Court that such a direction could not be issued under Article 226 of the Constitution. The Assam case too does not appear to be a case in which contractual obligations were enforced by the issue of any writ. It was a case in which a fishery had been settled by the State although against the rules framed for the purpose under the Assam Land Revenue Act. The learned counsel for the respondent has, therefore, not been able to satisfy us that he could have recourse to a writ of mandamus in order to compel the liquidators to execute a lease in favour of his client. That relief too cannot, therefore, be granted in this petition.

The last contention of the learned counsel for the respondent is that, as his client had suffered an injury and had been deprived of a right, he was entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution for relief. The terms of the Article are, it is argued, wide enough to empower the Court to give relief to the respondent even if what he claims does not fall strictly within any of the recognized writs. The Court, it is said, should not reject the respondent's petition simply because he has not prayed for the proper relief, but some other suitable order or direction should be issued.

It is true that, as observed by the Supreme Court in *T. C. Basappa v. T. Nagappa* (3) :

"The language used in Articles 32 and 226 of the Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs

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(1) A. I. R. 1956 Assam 48. (2) 1952 S. C. R. 28.
(3) A. I. R. 1954 S. C. 440.

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in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for enforcement of the fundamental rights, and in the case of the High Courts, for other purposes as well. In view of the express provisions in our Constitution the Court need not now look back to the early history or the procedural technicalities of these writs in English Law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges."

Their Lordships, however, proceeded to emphasize that the Court—

"can make an order or issue a writ in the nature of certiorari in all appropriate cases and in appropriate manner, so long as it keeps to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

The powers of the Court under Article 226 are wide but they are not untrammelled. These powers have to be exercised subject to a sound judicial discretion, and it is not possible for the Court to ignore the practice that obtains and the rules that are followed in the country where writs had their origin. It is not necessary for the Court to pin down the respondent to the reliefs which he claims, and if it is found that relief can be given in any other form, the Court will not hesitate to grant it. In deciding what relief can be granted to a petitioner under Article 226 of the Constitution in the circumstances of a particular case, the Court has, however, to be guided by the "board of fundamental principles" which regulate the grant of writs in English Law. Now the main reliefs claimed by the respondent in this case are (i) the quashing of the orders, dated the 28th September and the 1st October, 1956, and the lease in favour of the appellant; (ii) a direction that the liquidators should

execute a lease in favour of the respondents ; and (iii) dispossession of the appellant and putting the respondent in possession. No writ in any recognized form can be issued for any of these purposes. The broad principle on which an order or direction can be issued being the same, we are of opinion, on the basis of such facts as are not in dispute in this case, that it is not open to the respondent to say that if a writ cannot be granted, a direction or order should be made. We think it is not possible for this Court in summary proceedings under Article 226 to grant any order or direction such as is sought by the respondent.

In our opinion, therefore, the third preliminary objection raised against the petition on behalf of the appellant is well founded and the petition should have been dismissed on the ground that no effective relief under it could be granted to the respondent. The petition could not, therefore, succeed.

In the view indicated above, it is not necessary to consider the other contentions raised on behalf of the appellant. The appeal, in our opinion, must succeed. It is consequently allowed and the petition dismissed with costs throughout.

Appeal allowed.

CIVIL MISCELLANEOUS

Before Mr. Justice Mehrotra

RAMESH CHANDRA VERMA (PETITIONER)

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Constitution of India, 1950, Articles 226, 309, 310, 311—Writ petition—Jurisdiction of High Court—Cannot substitute its own order for order of Tribunal—Tribunal's power—Order on no evidence—Writ of certiorari to be issued.

In a proceeding under Article 226 of the Constitution the jurisdiction of the High Court is not that of an appellate court and it cannot substitute its own order on merits to that of the inferior tribunal but can only quash the order on the ground that there is mistake of jurisdiction or error of law.

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After an order of the High Court quashing the order of an inferior Tribunal, the jurisdiction of the Tribunal does not cease to pass the necessary orders in the proceeding.

In a writ proceeding the High Court will not sit as a Court of Appeal and substitute its own decision for the decision of the inferior tribunal on the ground that in its opinion the evidence was not sufficient to make out a charge, but, if on the face of the record it is apparent that the trial court has come to a decision on no evidence, it will be a manifest error of law amenable to a writ of certiorari.

Case—law discussed.

Civil Misc. Writ No. 88 of 1957.

The facts appear in the judgment.

S. C. Khare and *A. Ralla Ram* for the petitioner.

The Standing Counsel for the opposite parties.

MEHROTRA, J.:—This is a petition under Article 226 of the Constitution, praying for a writ of certiorari quashing the order of the Chief Engineer, Local Self-Government Engineering Department, dated the 2nd of November, 1955, and the order of the State Government, dated 16th November, 1956, rejecting the appeal of the petitioner. Further a writ of mandamus directing the parties to treat the petitioner in service with all the advantages which the petitioner would have been entitled to in the normal course of events with effect from the date of his appointment.

This case has a long history and earlier facts will be referred to at its proper place. Briefly the facts, however, are that up to the 12th of February, 1950, the petitioner was working as work-agent in the Local Self-Government Engineering Department, Uttar Pradesh, in the Kanpur Division and thereafter as an Electrical and Mechanical Overseer. The Chief Engineer, Sri R. D. Verma, by his order, dated the 17th of December, 1952, terminated the services of the petitioner. An appeal to the State Government against that order was rejected in April, 1953. A petition under Article 226 of the Constitution was filed in this Court against the two orders, referred to above, which was numbered as Writ no. 636 of 1953 challenging the validity of those orders and the petition was allowed by a Bench of this Court on the

24th of November, 1953. On the 1st of December, 1953, the petitioner reported for duty but on the 23rd of December 1953, he was suspended from service and was asked to give an explanation to the previous charges made against him in the year 1952. A reply was given by the petitioner. He was again dismissed from service by the order of the Chief Engineer, dated the 20th of May, 1954, with effect from the 12th of May, 1954. Another petition was filed in this Court under Article 226 of the Constitution, which was numbered as writ no. 883 of 1954. This was also allowed by this Court on the 10th of January, 1955. On the 14th of January, 1955, the petitioner again reported for duty but he was again served with an order, dated the 7th of February, 1955, under the signature of the Chief Engineer, suspending him from service and he was asked to submit his written explanation to those previous charges framed against him in 1952. A reply was sent by the petitioner to those charges. According to the petitioner, three charges out of the four served on him were the old charges and the fourth was a new one. On the 21st of March, 1955, the petitioner received a letter from the Chief Engineer, asking him to furnish within seven days the complete list of witnesses with their correct names and addresses whom the petitioner desired to be summoned for his defence. The petitioner prayed for time but no extension of time was granted to him. As the petitioner apprehended that he will not have a fair trial, he came up to this Court again under Article 226 of the Constitution by means of a writ petition, which was numbered as Writ no. 506 of 1955. That was rejected on the 6th of May, 1956, at the preliminary hearing. In that petition there was a prayer for a writ of prohibition directing the opposite parties not to proceed with the enquiry on the ground of prejudice. Thereafter by an order, dated the 20th of July, 1955, Sri H. P. Ghosh, the Personal Assistant to the Chief Engineer, was appointed to conduct the enquiry into the charges levelled against the petitioner. The hearing of the case was fixed for the 26th of July, 1955, onwards and the petitioner was asked to attend the office of the Chief Engineer in that connexion regularly. The

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petitioner gave his written explanation. Two provisional replies were submitted to the charge-sheets, dated the 7th of February, 1955, under protest, as, according to the petitioner, he was not given sufficient opportunity to inspect the records and had not been provided with copies of documents. After enquiry the petitioner received a show-cause notice to which he replied and by an order, dated the 2nd of November, 1955, the petitioner was dismissed. An appeal was filed by the petitioner against that order to the State Government which was rejected by the Government by its order, dated the 16th of November, 1956, and the present petition was thereafter filed in this Court on the 7th of January, 1957, and was admitted.

From the statement of facts given about it will appear that the petitioner had approached this Court thrice before for relief under Article 226 of the Constitution. Twice against an order of dismissal and the last time during the pendency of the enquiry for a writ of prohibition directing the enquiring officer not to proceed further with the enquiry. The charges substantially were the same as those served on the petitioner in the year 1952. Three of the charges are common and the fourth charge was added when the present enquiry was started.

A number of points have been raised by the counsel for the petitioner and a wide field has been covered in the arguments by the counsel for the parties. The first point raised by the petitioner is that in the absence of any direction issued by this Court in the earlier petitions to the effect that further enquiry be held in the matter, the opposite parties have no right to hold fresh enquiry or to continue the enquiry against the petitioner merely because the order of dismissal passed at an earlier stage was quashed by this Court. The next point urged is that the appointing authority was biased and consequently his decision was without jurisdiction. The third contention raised is that the petitioner could not effectively cross-examine any witness in the absence of any examination in chief. No examination in chief was

recorded in this case. The witnesses who were referred to in the charge-sheet as the witnesses on whom the department relied were produced for the cross-examination on the date of enquiry and the petitioner was asked to cross-examine them. The point raised by the petitioner is that without recording the statements in chief before the petitioner, it cannot be said that he was given effective opportunity to cross-examine by merely producing those witnesses for cross-examination by the petitioner. It was fourthly contended that the petitioner was not given any reasonable opportunity to show cause against the order of his dismissal. Lastly, it was contended that there was no evidence on which the dismissal order of the petitioner could be maintained. There were other minor points raised, which in substance attack the proper conduct of the enquiry and the reasonable opportunity given to the petitioner.

A counter-affidavit has been filed in this case on behalf of the opposite parties and all the points urged by the petitioner have been controverted.

The Standing Counsel very strenuously contended three points as preliminary objections to the maintainability of the petition. He canvassed that every civil servant under Article 310 of the Constitution holds his post during the pleasure of the President or the Governor as the case may be. If he holds office under the Union Government, he holds it during the pleasure of the President and if he is employed in connection with the State work, he holds office during the pleasure of the Governor. The pleasure of the President or the Governor is only subject to the provisions of Article 311. If there has been any violation of the guarantee given to an employee under Article 311, the employee gets a right of action and the order in breach of such a guarantee will be set aside by this Court, but the pleasure of the President or the Governor cannot be curtailed by any rules framed by the President or the Governor in the exercise of the power under Article 309. Such rules are mere directions issued to the subordinate authorities for their guidance

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and any breach of such rules as such cannot be enforced by means of an action in a court or by means of a writ under Article 226 of the Constitution. The only guarantee given to the civil servants is embodied in Article 311. If it is found from the circumstances of a particular case that the petitioner had been given a reasonable opportunity to explain his conduct and to show cause against the action proposed, and, if the order has been passed by an authority not subordinate to the appointing authority, the order must be upheld and this Court will not set aside that order on the ground that there has been any violation of any provisions of the rules laying down the procedure of enquiry for the guidance of the subordinate officers when conducting such an enquiry. If rules of evidence are not observed during the course of enquiry, that by itself will not vitiate the entire enquiry.

It was also urged by the Standing Counsel that this Court in the exercise of its powers under Article 226 of the Constitution will not issue a writ of certiorari only on the ground that there is no evidence. Whether there is evidence or not is a matter left to the exclusive jurisdiction of the Tribunal which enquires into the matter and it cannot be examined by this Court under Article 226 of the Constitution whether there is any evidence in support of the finding of the enquiring officer or not,

The first contention of the petitioner, in my opinion, has no force. A writ of certiorari has the effect of removing the orders from the way of a party. When the order passed by the subordinate tribunal is quashed, it is removed from the way of a party in enforcing his rights. It cannot prohibit the Tribunal or authority to proceed further in the matter according to law. It was contended by Mr. KHARE that in the absence of any direction in the previous order if the party is allowed to proceed afresh with the enquiry, then once the order of dismissal has been set aside, it may result in the abuse of the power, and this Court in the exercise of its powers under Article 226 of the Constitution can prevent such an abuse of power. It is argued that in cases where the order of a

subordinate tribunal has been set aside on the ground that there is no evidence, if power is given to the authority or to the Tribunal to deal with the matter again, it will be open to the party to fill in the lacuna in the evidence and produce fresh evidence. This abuse can only be avoided if it is held that in the absence of any direction in the order of this Court, no fresh proceedings can be started once the final order in a proceeding has been set aside. The effect of the order passed by this Court under Article 226 of the Constitution is to quash the final order passed in the proceeding; but that does not take away the power of the Tribunal to re-hear the matter in the absence of any direction to the contrary in the order passed by this Court. A writ of certiorari is a high prerogative writ, but it enables a superior court, a court of record, to correct the orders and decisions of inferior courts or tribunals, discharging judicial functions. If an order is made without jurisdiction or if an inferior court or tribunal refuses to exercise jurisdiction vested in it in law or if there is error apparent on the record, a writ of certiorari corrects the errors and jurisdiction in law of the inferior court or tribunal. But the superior court does not act as a court of appeal and it cannot substitute its own order on the merits of the case for the order which it quashes of the inferior court or tribunal. When the order of the inferior tribunal is quashed the Tribunal is left at large to pass any proper order in the light of the decision of this Court, but if the order of the Tribunal is maintained by the High Court, it becomes final. The jurisdiction, therefore, exercised by the High Court is not that of an appellate Court. It cannot substitute its own order on merits to that of the inferior tribunal but can only quash the order on the ground that there is mistake of jurisdiction or error of law. If this is the true scope of the power exercised by this Court under Article 226 of the Constitution, it cannot be said that the jurisdiction of the inferior tribunal ceases and it cannot pass the necessary orders in a certain proceeding before it merely because there is no direction by the superior court when setting aside the final order passed by the Tribunal. Reference in this connexion

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may be made to the case of *M. D. Thakur v. The Labour Appellate Tribunal* (1).

I shall now take up the preliminary points raised by the Standing Counsel. In short, the contentions raised by him are that Article 310 of the Constitution provides that every civil servant holds his post subject to the pleasure of the President or the Governor as the case may be. The pleasure of the President or the Governor is only subject to the guarantee provided under Article 311 of the Constitution. If there has been any breach of any guarantee given under Article 311 to an employee, it gives a right of action to the employee in a court of law. But no other restriction can be placed on the powers of the President or the Governor, as the case may be, to determine the services of an employee and any rules made under Article 309 of the Constitution cannot have the effect of curtailing the pleasure of the President or the Governor under Article 310 of the Constitution. The proposition that the only limitation placed on the exercise of the pleasure of the President or the Governor under the Constitution is the guarantee given to an employee under Article 311 of the Constitution cannot be disputed. Article 310 has in express terms provided that the pleasure is subject to the express provisions of the Constitution. There cannot, therefore, be any other restriction on the pleasure of the President or the Governor. The question, however, to be considered is, if the President or the Governor has made certain rules laying down the manner in which his pleasure is to be exercised, does any breach of such a procedure entitle an employee to come to this Court for a mandamus directing the authority concerned to carry out the provisions of such a rule. The contention raised by the Standing Counsel is that the breach of any such rules cannot be made a ground of action by an employee. Such rules are essentially in the nature of instructions issued by the President or the Governor for the guidance of the authorities through whom the pleasure is exercised. Reliance was placed on the case of *Jagannath Prasad v. State of*

(1) 1955 Bom. L. R. 1148.

U. P. (1). Particular reference was made to the following passage at page 632 of the report :

"The Governor's power to dismiss at pleasure is subject only to the express provisions of the Constitution. Power is conferred upon the Governor by Article 309 to make rules regulating the conditions of service of civil servants of the State Government, but such power is subject, 'inter alia', to the provisions of Article 310. No rules can be made which fetter or restrict his power to dismiss at pleasure. We find ourselves in agreement, if we may say so with respect, with the views of DIXIT, J., on this point in *Mrs. Lilawati v. State of Madhya Bharat* (2). The Disciplinary Rules were made prior to the commencement of the Constitution, and assuming they were validly made, they can, in our opinion, have no greater effect or stand on a higher footing than rules made by the Governor under Article 309. These rules [except rule 10 (1)] are in our opinion administrative rules, and the contravention of their provisions will not confer upon the petitioner a cause of action."

That was a case where a police officer was dismissed under section 7 of the Police Act. Proceedings under the U. P. Disciplinary Proceedings (Administrative Branch) Rules, 1947, were taken. The Tribunal made certain recommendation to the Governor and the Governor passed an order of dismissal, which was challenged by means of a writ petition in this Court and in that connexion these observations were made. In that case this Court was not called upon to decide whether the rules framed under Article 309 were administrative rules so as not to give any right of action when a breach of such a rule was committed. There may be cases where an authority is empowered to exercise the power of dismissal under the express provisions of the Act and certain rules may be

(1) A. I. R. 1954. All. 629. (2) A. I. R., 1952. Madh. B. 105.

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framed which lay down the procedure to be followed by such an authority before exercising its powers of dismissal. In that class of cases there is no difficulty in holding that if there is any breach on the part of the authority to follow the procedure laid down in the rules, the order becomes invalid and can be quashed by a writ of certiorari by this Court. It is equally clear that no fetters can be placed on the President's or the Governor's exercise of pleasure under Article 310, except the guarantee provided under Article 311, and if the President or the Governor himself purports to exercise that power, the only ground on which the exercise of such a power can be challenged is the failure to observe the provisions of Article 311 of the Constitution. The difficulty, however, arises in cases where the power of dismissal has been exercised by some subordinate authority under the provision of certain rules framed by the Governor himself. In this class of cases the question may be whether the exercise of such a power can be quashed by this Court if the authority has failed to observe the rules of procedure provided under the rules. It has been conceded by the Standing Counsel that if on the facts of a particular case it can be said that the power has not been exercised for or on behalf of the Governor, or otherwise it cannot be regarded as the exercise of the pleasure by the Governor, it may be liable to be set aside on the ground that, the authority has failed to comply with the provisions of the rules. But if it can be treated to be an exercise of the pleasure by the Governor, no fetters can be placed on that power even under the rules framed by the Governor himself and under those circumstances it can only be said that such rules are only administrative rules for the guidance of the inferior authorities and do not give any right of action to an employee. Reliance was placed in this connexion on the case of *Mrs. Lilawati v. State of Madhya Bharat* (1). The reference was made to the following observations at page 108 of the report :

"Now as regards the tenure of office of persons serving the Union or a State, Article

(1) A. L. R. 1952. M. B. 105.

310 of the Constitution says that except as expressly provided by the Constitution, every person, who is a member of the Civil Service of the Union and every person who is a member of the Civil Service of a State, holds office during the pleasure of the President or of the Governor or the Raj Pramukh as the case may be. Article 311 prescribes the conditions which must be fulfilled before a person who is a member of the Civil Service is removed or dismissed or reduced in rank. It provides (1) that a member of the Civil Service shall not be dismissed or removed by an authority subordinate to that which he was appointed and (2) that he shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. . . . It is thus clear that persons employed . . . in service of the state, are engaged on the express statutory condition that they hold their employment at the pleasure of the President or the Governor or the Raj Pramukh, as the case may be, and that they can be dismissed, removed or reduced in rank at the pleasure of these authorities, subject to the limitation imposed by Article 311. It must be noted that Article 311 does not, in any way, alter or affect the principle embodied in Article 310 that a government servant holds office during the pleasure of the President or the Governor or the Raj Pramukh, as the case may be. It only imposes certain statutory obligations before dismissal or removal or reduction in rank is effected. It is the breach of these statutory obligations that

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affords a cause of action to a person adversely affected to complain that his employment has been wrongly terminated.

The extent of the rights of a government servant in the matter of tenure of his office must be gathered from a reading of Articles 310 and 311 of the Constitution. He cannot have any rights apart from these provisions of the Constitution."

As regards certain rules on which reliance was placed in that case, it was observed that—

"These rules which prescribe the conditions of the service, that is to say, the circumstances and the manner in which the employment of a civil servant can be terminated though framed by the Raj Pramukh under the power conferred by the proviso to Article 309 of the Constitution, do not in any way abridge or control the power of the President or the Governor or the Raj Pramukh to dismiss at pleasure a civil servant."

To the same effect is the case of *Prem Biharilal v. State of Madhya Bharat* (1).

The examination of all the authorities cited by the Standing Counsel on this point reveals that the pleasure of the President or the Governor or the Raj Pramukh under Article 310 is only subject to the express limitation provided for under Article 311 of the Constitution. Any rules framed relating to the tenure of office cannot limit the exercise of the pleasure by the President or the Governor or the Raj Pramukh, as the case may. If the rules are such as deal with the conditions of service, and not tenure of employment, such rules may have statutory force and any violation of such rules may be enforceable by means of a writ petition, but the rules which deal with the tenure of service and have got the effect of limiting the pleasure of the

(1) A. I. R. 1954. M. B. 49.

President or the Governor or the Raj Pramukh, as the case may be, they can only be regarded as administrative rules containing directions for the subordinate authorities and any contravention of these rules may not confer upon the petitioner a cause of action. The question does not however, arise in the present case. What the petitioner has contended is that there has been a violation of the guarantee given to the civil servant under Article 311. That the petitioner is a civil servant and holding a post under the Governor is not denied and that he is entitled to the protection under Article 311 cannot be seriously contested. The Standing Counsel has no doubt urged the point that the petitioner was not entitled to the protection under Article 311, but I shall deal with that objection at a later stage. At present, it is sufficient to point out that the case put forward by the petitioner is that the guarantee given to him under Article 311 has been violated in this case inasmuch as he had not been given reasonable opportunity to show cause against the action proposed. In this connexion another argument may be considered.

Article 311 of the Constitution expressly gives protection to a civil servant in two ways : firstly, that a civil employee cannot be dismissed, removed or reduced in rank unless he has been given an opportunity to show cause against the action proposed, and, secondly, that he cannot be dismissed by an authority subordinate to the appointing authority. Notice is given to an employee to show cause against the action proposed after the stage when the enquiring officer or the Governor comes to a finding that the charges against the employee have been *Pirma facie* established. Article 311 in express terms does not provide for any notice to show cause against the charges. But the opportunity to show cause does not mean only giving an opportunity to offer an explanation. The contents of the words "show cause" are wider than giving of a particular opportunity to give a written explanation and in this view of the matter unless the opportunity given at an earlier stage is regarded as sufficient compliance with the provisions of Article 311 merely an opportunity given to offer an explanation

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against the proposed action cannot be regarded as sufficient compliance with Article 311, and in every case the civil servant will be entitled to a fresh opportunity to show cause against the proposed action. The reasonable way, therefore, of interpreting Article 311 is that the disciplinary proceedings against a civil servant should be taken as a whole and it is necessary that an opportunity should be given to a civil servant to show cause at one or the other of the two stages. Thus, it is necessary that reasonable opportunity should be given to a civil servant to show cause against the charges made against him, and that is also a protection afforded to a civil servant under Article 311 of the Constitution.

The main question, therefore, to be considered in the present case is whether any reasonable opportunity was given to the petitioner to show cause against the charges. The question, whether in a particular case such an opportunity has or has not been given, is a question of fact depending upon the circumstances of each case and the circumstances upon this case will thus have to be examined in detail in order to come to the conclusion whether such an opportunity has or has not been given in the present case. It was also in this connexion urged by the Standing Counsel that the contents of a reasonable opportunity do not require an enquiry in accordance with the procedure laid down in the Civil Procedure Code and that the enquiring officer is not to act as a court and the rules of evidence need not be followed. As a broad proposition of law that in a disciplinary enquiry the rules of procedure for a court need not be observed and the rules of evidence need not be strictly followed cannot be disputed, but all the facts of the case will have to be examined. The breach of the rules of evidence, which may be nothing but rules of natural justice, may be relevant in connexion with the question as to whether sufficient opportunity was or was not given to the petitioner in a particular case to show cause against the charges.

The other preliminary point raised by the Standing Counsel was that this Court cannot issue a writ of

certiorari on the ground that there was no evidence before the inferior tribunal on which the order could be passed. *Mr. Khare*, who appears for the petitioner, challenges the correctness of this proposition and the contention raised by him is that a writ of certiorari can be issued under Article 226 of the Constitution not only on the ground that there was excess of jurisdiction vested in the inferior tribunal, but also on the ground that there is a manifest error in the decision apparent on the face of the record of the case. If the decision of the inferior tribunal is based on the face of the record and makes such an order amendable to a writ of certiorari by this Court. In this connexion it was also contended by *Mr. Khare* that an order passed by the tribunal or an officer without evidence can be regarded as an arbitrary, wanton and *mala fide* order and can be set aside by this Court under Article 226 of the Constitution. The Standing Counsel strongly relied in support of his contention on the case of *The King v. Nat Bell Liquors, Limited* (1); the head-note of the case lays down that—

"A conviction by a magistrate for a non-indictable offence cannot be quashed on certiorari on the ground that the depositions show that there was no evidence to support the conviction, or that the Magistrate has misdirected himself in considering the evidence; absence of evidence does not affect the jurisdiction of the Magistrate to try the charge".

The case has exhaustively dealt with the procedure on certiorari. All the English and Canadian cases have been reviewed. It is, however, not necessary to give in detail the facts of the case. It is clear from a reading of the case that this case is an authority for the proposition that the want of evidence cannot be regarded as want of jurisdiction. A writ of certiorari can issue not only on the ground of want of jurisdiction but also on manifest error of law, and this case is no authority for the proposition that the decision based on no evidence cannot be treated

(1) L. R. (1922) 2 A. C. 128.

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to be a manifest error. At page 156 of the report it is observed as follows :

“That the superior court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points : one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise ; the other is the observance of the law in the course of its exercise.”

Another passage at page 152 of the report is as follows :

“To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong ; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all.”

This passage indicates that their Lordships of the Privy Council were only considering the effect of total absence of evidence as a question of jurisdiction and that a decision based on no evidence can be regarded as manifestly erroneous was not considered by their Lordships in this case at all.

Reliance was placed by the counsel for the petitioner on the case of *R. v. Birmingham Compensation Appeal Tribunal* (1) in support of the proposition that the writ of certiorari can issue on the ground that there is no evidence on which the decision could be based.

(1) [1952] 2 All E. L. R. 100.

Reliance is placed on the following observations at page 101 of the report :

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“For the purpose of the case it was immaterial to determine whether ‘customary practice within para. 8 (1) (i) meant something confined to the relationship between the workman and his own employers or whether it involved larger considerations of what was customary in a particular trade since, whether the wider or narrower meaning was contemplated, a single case of a manager receiving payment by way of compensation on discharge was not what the regulations contemplated by ‘customary practice’, and there as no evidence in this case of an ‘expectation under customary practice to the payment of compensation in the event of discharge’. Accordingly, as an error of law appeared on the face of the award the certiorari would issue to remove the order into the High Court to be quashed.”

The next case referred to was *Babu Ram Sharma v. State of Uttar Pradesh* (1). At page 643 of the report, it was observed as follows :

“The result is, therefore, that the Regional Transport Authority and the State Transport Tribunal have arrived at a finding of fact which is not only unsupported by any evidence but is contrary to such evidence as there is ; and to come to a finding of fact in the absence of any evidence amounts, in my view, to an error of law, if not to a violation of the principles of natural justice. An error of law apparent on the face of the proceedings is recognized in England as good ground for the issue of an

(1) A. I. R. 1953. All. 641.

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order of certiorari ; — '*R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* (1)' and although our attention had not been drawn to any case in India in which the same view has expressly been taken it would appear to be in accordance with the pronouncement of the Supreme Court in 1952 S. C., 192, at page 195."

Since this decision, there have been cases of the Supreme court where the decision in *R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* (1) has been accepted as the law applicable in India.

The next case relied upon by the counsel for the petitioner is the unreported decision of this Court in : *Md. Ibrahim v. The State of Uttar Pradesh* (2). That was a case in which a police officer was dismissed on an enquiry under section 7 of the Police Act. It was held by the Bench that there was no evidence against the petitioner and the order of dismissal was set aside. It is argued by the Standing Counsel that this case was based on the interpretation put on the provisions of the Police Regulations laying down the procedure for the enquiry. It was held in this case that the evidence produced in the case was not legal as contemplated by the provisions of regulations 490 of the Police Regulations. To my mind, the result of the examination of these authorities is that this Court in a writ no doubt will not sit as a court of appeal and substitute its own decision to the decision of the inferior tribunal on the ground that in its opinion the evidence was not sufficient to make out a charge ; but if on the face of the record it is apparent that the trial court has come to a decision on no evidence, it will be a manifest error of law amenable to a writ of certiorari by this Court. The order of the inferior tribunal in cases where it can be regarded as speaking order will be examined by this Court and if it appears from the perusal of the order itself that the reliance has been

(1) [1952]1 All E. L. R. 122. (2) Special Appeal no. 342 of 1955, decided on 2nd April, 1957.

placed on the evidence which cannot be regarded as evidence at all establishing a charge, it is open to this Court to set aside the order on the ground of manifest error of law. Each case will depend upon its own circumstances.

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The next point to be considered is what is the scope of the contents of the words "show cause" in Article 311 of the Constitution. In the case of *Rama Shanker Srivastava v. The Divisional Superintendent, Northern Railway, Allahabad* (1) it was observed by a Bench of this Court at page 68 as follows :

"The question is whether at this stage, (when notice is issued to the employee to show cause against the proposed action), the petitioner was entitled to claim an enquiry by which the petitioner obviously meant that he should be given an opportunity to disprove the charges against him by adducing his evidence in that behalf That the petitioner has a right to claim an enquiry even at the stage when a notice is served on him for the purpose of complying with the provisions of Article 311 of the Constitution can no longer be doubted. Article 311 of the Constitution lays down for cases such as the case of the petitioner that no such person shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The expression 'reasonable opportunity of showing cause' was interpreted by a Division Bench of this Court in the case of *Ravi Pratap Narain Singh v. State of Uttar Pradesh* (2) in which the view expressed in an earlier Bench case *Avadhesh Pratap Singh v. State of Uttar Pradesh* (3) was

(1) 1956 A.L.J. 65.

(2) A. I. R. 1952 All. 99.

(3) 1952 A.L.J. 342.

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followed and approved. The expression "showing cause" was held to connote "an opportunity of leading evidence in support of one's allegation and in controverting such allegations as are made against one."

Mehrotra, J. The opportunity to show cause, therefore, does not imply only an opportunity to explain. It must be a reasonable opportunity and substantial opportunity to the petitioner to show cause against the charges. As has been pointed out by me earlier, it will be a question of fact to be determined in each case whether it can be said that a reasonable opportunity has been given or not. No hard and fast test can be laid down by which it can be determined whether a reasonable opportunity has or has not been given. The ratio which should govern the class of cases to which Article 311 (2) of the Constitution in terms may not apply has been well laid down in *Arthur John Spackman v. Plumstead District Board of Works* (1). In this case Lord SELBOURNE at page 240 observed as follows :

"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a Judge in the proper sense of the word, but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give a notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice. But it appears

(1) L. R. [1885] 10 A.C. 229.

to me to be perfectly consistent with reason, that the statute may have intentionally omitted to provide for form because this is a matter not of a kind requiring form, not of a kind requiring litigation at all, but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in this judgment ought to be brought before him. When that is done, from the nature of the case, no further proceeding as to summoning parties, or as to doing anything of that kind which a judgment might have to do, is necessary."

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The Standing Counsel has relied upon the case of *Choudhury v. The Union of India* (1). In that case it was rightly held that what is reasonable opportunity has not been defined in the Constitution or the General Clauses Act, but the words have acquired a legal meaning and it cannot be left to the vagaries of each individual, since that would introduce a thousand shades of reasonableness, which cannot be permitted. It was observed at page 665 of the report that the word "reasonable" must, therefore, mean according to the rules of natural justice, which are rules of law: [*P. Joseph John v. State of Travancore-Cochin* (2)]. What are "Rules of natural justice" has not been completely or absolutely defined. But some principles have been laid down, which are widely accepted. Two of these principles are generally applicable to all departmental enquiries, namely, (a) a person must be told clearly and specifically of the offences with which it is intended to charge him, and (b) he must not be condemned unheard: *Board of Education v. Rice* (3), *Local Government Board v. Aldridge* (4), *Staforf v. Minister of Health* (5), *Dipa Pal* 1. *University of Calcutta* (6);

(1) A. I. R. 1956. Cal. 662.

(2) 1955 S. C. A. 85.

(3) L. R. [1911] A.C. 179.

(4) L. R. [1915] A. C. 120.

(5) L. R. [1946] I.K.B. 621.

(6) A. I. R. 1952 Cal. 594.

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K. Ramayya v. The Madras State (1), *K. L. Chatterjee v. Union of India* (2), *Shiv Nandan Sinha v. State of West Bengal* (3). Bearing these two principles in mind, the procedure to be followed becomes easy of comprehension. A departmental enquiry consists of four main stages, viz., (a) charge, (b) investigation of the charge, (c) finding, punishment and (d) appeal. A departmental enquiry is not conducted with the rigidity of a judicial trial. Hence, the charge which is to be framed need not be framed with the precision of a charge in a criminal proceeding. But it must not be vague or so general as to make it impossible of being traversed. The test is as to whether the charge conveys to the delinquent the exact nature of the alleged offence, in a way that would enable him to meet the charge. In order to frame a charge, it is permissible to have a preliminary enquiry. As regards the investigation of the charge, a departmental enquiry is not a judicial proceeding and the law and procedure applicable to judicial proceedings are not applicable. The strict rules of the law of evidence are not to be applied. But this does not mean that the proceedings can be held in an arbitrary manner. The rules of natural justice must still be applied. Ordinarily, there must be a personal hearing. If a person is entitled to show cause, he is entitled to a hearing, and if he is entitled to a hearing, he must have the opportunity of being personally heard, of calling his own evidence and cross-examining any witness called by the prosecution. There is no bar upon the authority entitled to punish, to delegate the enquiry to subordinate officials. But the person dealing with the enquiry at any stage is in the position of a Judge, and the rules of natural justice demands that he should not himself be personally interested in the case. The provisions of the Indian Evidence Act are not strictly applicable, so it is not relevant to consider if facts have been proved according to law. Where witnesses are called, their entire evidence must be taken in the presence of the delinquent,

(1) A. I. R. 1951 Mad. 1003

(2) (1953-54)58 CWN. 492.

(3) (1954-55)59 C.W.N. 794.

who must be permitted to cross-examine all such witnesses. It is not permissible to examine witnesses in the absence of the delinquent or take *ex parte* statements and then ask the delinquent to cross-examine.

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Having discussed the authorities cited by the parties on this point it is now necessary to examine the circumstances of the present case in order to ascertain whether in the present case the petitioner was or was not given a reasonable opportunity to show cause against the charges.

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The facts which resulted in the dismissal of the petitioner briefly are that the petitioner was first dismissed by the Chief Engineer by his order, dated the 19th of December, 1952, with effect from the 7th of January, 1953. A petition was filed in this Court challenging the order which was allowed on the 24th of November, 1953. By an order, dated the 30th of January, 1954, the Chief Engineer re-started proceedings against the petitioner and ordered his suspension. He was again dismissed with effect from the date of suspension, namely, the 7th of January, 1953, and he challenged the second order of dismissal by another writ petition in this Court, which was allowed on the 10th of January, 1955. Fresh proceedings were started, a charge-sheet was served upon the petitioner and the charges which were levelled against him on the 25th of March, 1952, were brought afresh against him and charge (D) was added. A copy of the charge-sheet was served on the petitioner on the 10th of February, 1955. The petitioner asked for the copies of the documents referred to under each charge, and it is stated in the counter-affidavit that they were supplied to him on the 23rd of February, 1955. The time for the petitioner to submit his explanation was extended from time to time up to the 4th of May, 1955. Sri Harihar Prasad Ghose was appointed the enquiring officer by the Chief Engineer, *vide* his letter, dated the 20th July, 1955, and fixed the 26th of July, 1955, for the commencement of the enquiry. The proceedings were held before the enquiring officer on the 26th and 27th of July and the 4th, 5th, 18th, 19th,

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25th and 26th of August, 1955. On the 26th of July, 1955, the petitioner gave out the names by means of an application of certain persons who were the complainants according to him. As Sri N. R. Gupta, Executive Engineer and Sri S. N. Misra, Assistant Engineer, III Division, L. S. G. E. D., Kanpur, were present on the 26th of July, 1955, the petitioner was asked to cross-examine them. The cross-examination of Mr. S. N. Misra was continued on the 27th of July, 1955.

As regards the witnesses who were examined before the enquiring officer, the petitioner has stated in his affidavit filed in support of the petitioner in paragraph 20 (iii) that there was no examination in chief of these witnesses, nor the witnesses made any statement at all as to what was their story. The petitioner was asked to cross-examine the witnesses in the absence of any examination in chief. Similar statement has been made in paragraph 23 (ii) of the affidavit. In paragraph 29 of the counter-affidavit it is averred that the enquiring officer considered the evidence under each head of the charges, i.e., which is specified in each charge under the headings "Evidence which it is proposed to consider in support of the charge". The persons who had written these letters or made endorsements were called as witnesses. The petitioner put questions to the witnesses. The enquiring officer also put questions to the witnesses and to the petitioner whenever he considered necessary to clarify the issues.

The grievance of the petitioner is that the statements of the witnesses were not recorded in his presence by the enquiring officer. The procedure which was in substance adopted by the enquiring officer was that he treated the statements contained in certain letters either written by some of the witnesses or endorsed by them as their statements in chief. A copy of these documents having been supplied to the petitioner earlier, the enquiring officer thought that the petitioner had knowledge of the statements contained in those letters and endorsements and the only opportunity which was necessary to give to the petitioner was to permit him to

cross-examine these witnesses and it was not necessary to record their statements before the petitioner again. That there were certain letters written by some of the witnesses and some of the witnesses had only made endorsements in those letters is not denied. But the statements of the witnesses which the enquiring officer intended to take into consideration or did take into consideration when giving his findings were not brought on the record. The argument of the Standing Counsel is that the rules of evidence were not necessarily to be followed in such enquiry and even if there were no examination in chief recorded by the enquiring officer, the petitioner knew what the evidence of these witnesses was and for what purpose they had been called and he fully cross-examined these witnesses. Under these circumstances it cannot be said that he was not given any reasonable opportunity to defend his case. In the charge-sheet the names of the witnesses and the documents were mentioned on which the department intended to rely in proof of the charges. In what manner these witnesses were going to establish the charge and what in fact was going to be their testimony, which would support the charge, could not be indicated in the charge-sheet itself. It was not a case where they were only called to prove certain letters which had already been written by them or endorsed by them, but they were witnesses of fact on which the charge depended and unless their statements were brought on the record, there could be said to be no evidence in support of the charges. The petitioner was in effect asked to cross-examine in vacuum. It is true that in the present case the petitioner had already been twice dismissed, the charges had been levelled against him in the year 1952. Three of the charges were repeated and he knew what the grievance of the department against him was, but what each witness was going to state against him could not have been known to him. The formal proof of certain documents written by the witnesses may not have been required, but if their statements were to be relied upon by the enquiring officer, who was in the position of a judge in support of his findings, it was essential that the

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statements should have been taken in the presence of the petitioner. It was very strenuously urged by the Standing Counsel that the fact that the petitioner made a thorough searching cross-examination itself suggests that he was not in any manner prejudiced by the failure to record the statements of the witnesses. It is true that the long cross-examination has been done in the case ; but in the absence of any statements of the witnesses on the record the cross-examination cannot be said to have any relation to the evidence given by the witnesses. The argument in substance is that if the petitioner refused to cross-examine the witnesses, he could have legitimately argued that he was prejudiced by not recording the examination in chief. But because he had decided to cross-examine the witnesses which can only be ordered*that he agreed to put certain questions to the witnesses, he is not entitled to say now that he has been in any manner prejudiced in his defence. It should also be pointed out that the question is not whether the petitioner could make an effective cross-examination, but the real question to be determined is whether in the circumstances it can be said that the petitioner was given a reasonable opportunity to defend his case.

The following charges were framed against the petitioner on the 7th of February, 1955 :

- (A) False claim of T. A. for Rs.12-13 for the journey said to have been performed from Nagina to Roorkee on 19th July, 1949, and back from Roorkee to Nagina on 20th July, 1949.
- (B) Demand of illegal gratification from a contractor at Chunar.
- (C) Illegal payment made to labourers for loading an engine at Chunar Fort.
- (D) Disobedience in complying with the instructions of the Assistant Engineer in connexion with taking of measurements of works.

Regarding charge (A) Sri N. R. Gupta, Executive Engineer, III Division, L. S. G. E. D., Kanpur, Sri S. N.

Misra, Assistant Engineer, Sri S. L. Verma, ex-Work Agent and Sri Ram Bharose Chowkidar were called as witnesses. Regarding charge (B) Sri Laxman Prasad Pujari, contractor, Sri S. K. Gue, Supervisor, Industrial Training Institute, Allahabad, Bandham Ram, ex-Chowkidar, Sri N. R. Gupta, Executive Engineer, were mentioned as the witnesses in the charge-sheet. Regarding charge (C), Sri S. N. Misra, Assistant Engineer, Sri T. K. Mittra, Overseer, Sri Bachai Ahir, Sri N. R. Gupta, Executive Engineer, Sri T. P. Vishwakarma, Overseer, Sri Baij Nath, ex-Truck Driver, Sri Lalloo Singh, Cleaner, Sri Mansa Ram, Steam Engine Driver, Sri R. D. Sahi, Sri Ram Jiyawan and Sri Shyama Charan Dubey were mentioned as witnesses in the charge-sheet. For charge (D), Sri T. K. Mittra, Overseer, Sri S. N. Misra, Assistant Engineer, Sri C. P. Kaushik, Assistant Engineer, and Sri N. R. Gupta, Executive Engineer, were mentioned as witnesses.

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On charge no. (A) the finding of the enquiring officer was that the claim of the false T. A. is proved against the petitioner from the following facts :

- (1) The statements of Sri Ram Bharose Chowkidar and Sri S. L. Verma, dated the 22nd of July, 1949, and the 8th of August, 1949, respectively.
- (2) The petitioner never informed Sri S. L. Verma, to come down to Nagina to hand over charge of T. & P. as proved by the statement of Sri S. L. Verma given by him in cross-examination of the proceedings held on the 4th of August, 1955.
- (3) The petitioner travelled to Roorkee on his own accord as no permission was accorded by the Executive Engineer.
- (4) The unauthorized journey should not have been performed by the petitioner.
- (5) The charge of the T. & P. was to be handed over at Nagina by Sri S. L. Verma, hence there was no necessity of the petitioner's

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proceeding to Roorkee to bring the keys of the Tool Room.

- (6) The fact that the night train was chosen by the petitioner to perform the journey which reaches Roorkee at 12 o'clock.
- (7) The petitioner should have waited for the return of the Chowkidar who was said to have gone to the market and made known his presence at Roorkee, if there be any truth in his statement.
- (8) The petitioner should have left instructions of his visit to some responsible person, say Chowkidar concerned, and not to the Mazdoor employed under some other agency found working there.
- (9) The petitioner had intimated the Executive Engineer that he should proceed to Roorkee on the 14th but he did not do so till the 19th.

Lastly, the enquiring officer observed that although the statements of Sri Ram Bharose, Chowkidar, and Sri S. L. Verma did not give any proof of the petitioner's not visiting Roorkee on the 20th, yet from the facts which are mentioned earlier he came to the conclusion that the charge is proved against him as no evidence was on the record or could be produced by Sri R. C. Verma to show that he was at Roorkee on the 20th of July, 1949.

Charge (B) is not found established against the petitioner by the enquiring officer.

Regarding charge (C), all the witnesses mentioned in the charge-sheet did not appear. The statements of Sri Mansa Ram has not been fully accepted by the enquiring officer. According to the enquiring officer, the statements of other witnesses could not help to prove the charge in full but he relied on the following circumstances in support of his finding that the charge has been established :

- (1) That the petitioner should have waited for the approval of the Executive Engineer, which

he sought telegraphically on the 16th of April, 1951. 1957

- (2) The thumb-impression of Sri Bachai Ahir indicated on the quotation submitted by the petitioner to the Overseer and attached with the voucher no. 3 of the imprest of the Overseer and that on the hand receipt differs from the thumb-impression taken by Sri T. P. Vishwakarma of Sri Bachai Ahir in the presence of Shyama Charan Dubey, a local man.

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He further held that doing his job in an unauthorized manner also proves that the Overseer was very careless in the performance of his duties.

Regarding charge (D), the enquiring officer accepted the explanation of the petitioner as to the first part of the charge ; but he found that the charge of not taking measurements properly of the works actually executed is proved on the cross-examination of Sri C. P. Kaushik, Assistant Engineer. The enquiring officer further found that the petitioner did not fully record measurements of extraction of 10" pipes on the tube-well while measurements recorded at page 14, M. B. no. 312 on the 20th of March, 1951, by him only recorded 60 ft. against 180 ft., which had to be corrected by the Assistant Engineer Sri Kaushik on the 30th of March, 1951. The petitioner objected that this measurement was not mentioned in the charge-sheet. The enquiring officer, however, held that although this particular measurement has not been specifically mentioned in the charge-sheet, yet it forms a part of the same measurements referred to in the earlier part of the charge-sheet and could be taken into consideration.

From the findings, which I have mentioned above, it is clear that so far as the charge no. (A) is concerned, the enquiring officer has mainly relied upon the statements of the Chowkidar and Sri S. L. Verma, dated the 22nd of July, 1949 and the 8th of August, 1949. These statements were not recorded in the presence of the petitioner. When the enquiry was going on in July and August,

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1955, these witnesses were put up for cross-examination, but no examination in chief was recorded. A statement of the witness, if that was to be relied upon by the enquiring officer, had to be recorded in the presence of the petitioner. The gravamen of the charge is the false statement made by the petitioner that he visited Roorkee on the 20th of July, 1949, although in fact he went there on the 22nd of July, 1949, and charged the T. A. In the absence, therefore, of any statement to support the fact that the petitioner did not visit Roorkee on the 20th of July, 1949, it cannot be said that there was any evidence to establish this charge against the petitioner. The Standing Counsel strongly relied upon the answers given by Sri S. N. Misra to the questions put by the petitioner in cross-examination. The petitioner asked Sri Misra "Did you ask anybody else besides myself about the same"? The answer given by Sri Misra was :

"Yes. At Roorkee from the Chowkidar and W/A on 28th July, 1949, whether you had been to Roorkee on 30th July, 1949. At Nagina, your reply was a sort of confession, hence I proceeded to Roorkee for further enquiry on the point and on return journey at Nagina on 29th July, 1949, I gave you a questionnaire on a slip of paper to be replied by you in writing in this connection."

On being further asked by the petitioner whether he informed him on the 29th of July, 1949, while handing over the slip that he had made enquiries at Roorkee about the petitioner's absence on the 20th of July, 1949, Mr. Misra replies as under :

"I think, I did ; and since I had learnt at Roorkee you had not visited Roorkee on 20th July, 1949, at all, which differs from your confession as made to me on 28th July, 1949, hence I gave you the questionnaire to explain your absence from Nagina on 20th July, 1949, and not going to Roorkee on that date."

These two answers by themselves prove that the confession made by the petitioner to him at Nagina was not to the effect that he did not go to Roorkee on the 20th of July, 1949. It cannot, therefore, be said that this answer by itself establishes the fact that the petitioner did not go to Roorkee on the 20th of July, 1949. Moreover, the enquiring officer, as I have already pointed out, relied upon the statement of the Chowkidar and Sri S. L. Verma made in the absence of the petitioner.

As regards charge (C) that while at Chunar he actually paid Rs.16 and got the signature of Sri Mansa Ram in the hand receipt disclosing the amount of payment of Rs.24 on the same, the petitioner had claimed Rs.24 but his claim for Rs.16 only was accepted and Rs.8 were recovered from him and thereby he acted in a very corrupt and dishonest manner. The petitioner had denied that he had deliberately charged Rs.24, although in fact he had paid Rs.16 to Bachai Ahir for the work taken. The petitioner in support of his contention has filed the quotation given by Bachai Ahir in which he had said that he wanted Rs.24 for the work and a receipt which was signed by him of the payment of Rs.24 to Bachai Ahir. This receipt was also signed by Mansa Ram. The statement of Mansa Ram has not been accepted by the enquiring officer. The department, however, relied upon the statement of Bachai Ahir taken subsequent to the receipt given by him, in which he had denied that he had been paid Rs.24 by the petitioner. The thumb-impression of Bachai Ahir on his statement appeared to be different from the thumb-impressions on the documents filed by the petitioner. Sri T. P. Vishwakarma, Overseer, was examined to prove the fact that he had recorded the statement of Bachai Ahir and had taken his thumb-impression. The person who gave his thumb-impression and made his statement was identified to be Bachai Ahir by one Shyama Charan Dube. Subsequently it appears that the copy of the statement was sent to an expert and the thumb-impression, on comparison with the thumb-impression of Bachai Ahir on some admitted document, it was said by the expert that that was his genuine thumb-impression. The

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petitioner's case was that on the date when this statement is said to have been made by Bachai Ahir, he was dead. It is, however, not necessary for me to go into those facts at all. The petitioner had filed in support of his case two documents which bore the thumb-impressions of Bachai Ahir. The statement made by Sri T. P. Vishwakarma of Bachai Ahir was filed on behalf of the department. By proving the genuineness of the thumb-impression on the statement recorded by Sri Vishwakarma, the department is trying to establish that the two documents filed by the petitioner do not bear the thumb of Bachai Ahir. During the course of the enquiry it was desired by the petitioner that the two documents should be sent to an expert but at that time it was pointed out that Bachai Ahir would be examined and consequently his prayer for sending it to an expert was rejected. If subsequently it was found that Bachai Ahir was dead, and his statement was sent to the expert, it was necessary that the two documents filed by the petitioner should also have been sent to the expert. It was also pointed out by the counsel for the petitioner that one of the documents appears from the report filed by the other side to have been sent to the Expert and the Expert has said that that tallies with the genuine thumb-impression of Bachai Ahir. It will also appear from the examination of the proceedings of the enquiry that the petitioner was asked to cross-examine Sri S. N. Misra on a later date after some other witnesses had been examined. When Sri Misra was again produced in cross-examination some hitch arose and the enquiring officer took objections to certain insinuations made by the petitioner. The result was that proceedings had to be terminated and the petitioner could not fully cross-examine Sri Misra. It cannot be said from the perusal of the entire proceedings that the enquiring officer was prejudiced against the petitioner or was not impartial, but at the same time the procedure adopted by him was such that it cannot be said that the petitioner was given reasonable opportunity to show cause against the charges. As I have already indicated, the enquiring officer recorded no statement of the witnesses, who were the witnesses of fact,

and had relied upon their testimony recorded earlier. He also did not give an opportunity to the petitioner to get two of his documents examined by the Expert and that the cross-examination of some of the witnesses could not be done fully on some of the charges as the proceedings were interrupted due to exchange of hot words between the enquiring officer and the petitioner.

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On the 5th of August, 1955, as the witnesses in connexion with charges (B) and (C) did not turn up, Sri S. N. Misra was put up for cross-examination on charge (D). The enquiring officer, when the proceedings started, recorded some facts about the proceedings and asked the petitioner to cross-examine. Certain questions were put by him and objections were raised to the questions put by the petitioner. The cross-examination had not proceed long, when the enquiring officer made the following remarks :

"I am afraid your explanation is not satisfactory. The mere fact that the A. E. found your M. B. incomplete, had to record the same in the form of a N. B. because subsequent measurement taken by you clearly proves that you failed to do your duty as an Overseer and have tried to shift the responsibility on the A. E. and, therefore, this charge stands proved against you."

At another place the enquiring officer made the following remarks :

"Since you refuse to answer my question, I take the charge as proved."

Before the cross-examination was complete and other witnesses were examined on this charge, it appears from the remarks quoted above that the enquiring officer had expressed his opinion about the charge (D) and the petitioner is thus justified in saying that he was not given a reasonable opportunity to defend himself.

Another point stretched by the petitioner was that the petitioner was not given sufficient facility to take legal advice. It is true that in the departmental trials the petitioner is not entitled to claim, as a matter of right,

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facility for legal advice, but the refusal to afford a reasonable opportunity to take the legal advice when viewed in the light of other circumstances may legitimately lead to the inference that the petitioner was not given a reasonable opportunity.

From the detailed examination of the facts, which I have enumerated above, it is clear that the examination, in chief of all the witnesses was not recorded in the presence of the petitioner. Some of the earlier statements made by the witnesses in the absence of the petitioner have been relied upon by the enquiring officer; secondly, that during the course of the cross-examination regarding some of the charges, the enquiring officer expressed his opinion that the charge stood proved against the petitioner; thirdly, that the cross-examination of Sri S. N. Misra, was abruptly closed, although the cross-examination on some of the charges was definitely postponed for after the evidence of other witnesses had been recorded; fourthly, the finding of the enquiring officer on the question as to whether the thumb-impression on the quotation and the receipt of Bachai Ahir was genuine or not cannot be regarded as a proper finding inasmuch as the request of the petitioner for sending them to an expert at an earlier stage was refused, and the petitioner in the circumstances of the case should not have been denied the opportunity to take legal advice in the matter; and lastly, it will appear that the petitioner has been dismissed twice by the department, three of the charges were common, only one additional charge is framed against the petitioner and the previous orders of dismissal were set aside by this Court. The charges related to events, which had happened sometimes past, and the petitioner from the very beginning expressed his apprehension that the attitude of the department appeared to be such as not to inspire any confidence in him so far as the enquiry was concerned. In these circumstances the petitioner demanded an enquiry by an officer who had no connexion with the department. It may be that the officer who conducted the enquiry was not necessarily unfavourably inclined towards the petitioner, but in the circumstances of the present case the

petitioner could have had a reasonable apprehension that he would not have a fair deal at the hands of the officers of the department and on the examination of all the circumstances a reasonable inference can be drawn that the petitioner was not given a reasonable opportunity to show cause against the charges. In this connexion reference may be made to the case of *Dr. K. Subba Rao v. State* (1). It will be useful to refer to some of the observations in that case, with which broadly I am in complete agreement. At page 416 of the report it was observed :

“Every member of the civil service holds his employment at the pleasure of the State. But the undoubted power of the State to dismiss him is controlled by the provisions of Article 311 of the Constitution. Except in the case governed by the proviso to sub-clause (2) of Article 311, such a servant cannot be dismissed or removed by an authority subordinate to that by which he was appointed and that he could be removed only after he has been given reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The action proposed to be taken in regard to a civil servant will be known only after an enquiry is held and after the authority concerned comes to a tentative conclusion on the merits, for the punishment would necessarily depend upon the gravity of the offence committed by the civil servant. Therefore, whatever machinery is provided by the State for the enquiry, whether it be through one of the executive officers or through a Tribunal for Disciplinary Proceeding, the entire enquiry from the beginning till the punishment is imposed on the officer is one process. It is an enquiry held by the authority empowered to remove the

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servant. Though the enquiry may have to be held in two stages, one up to the time the authority comes to a conclusion on the question of the offence committed by the civil servant and the other from the stage notice is given to show cause against the action proposed to be taken in regard to him, the entire process of the enquiry will have to be scrutinized by ascertaining whether reasonable opportunity is given to the servant to show cause against the action proposed to be taken in regard to him. The opportunity to show cause is qualified by the word 'reasonable'. It is for the Court on the facts of each case to scrutinize the entire record to come to a conclusion whether such a reasonable opportunity was given to the civil servant. If as a matter of fact, every opportunity was given to the civil servant to defend himself by examining witnesses and by cross-examining the prosecution witnesses it would be unreasonable to compel the authority to repeat the entire enquiry after the second stage is reached. It is true that reasonable opportunity to show cause against the action proposed to be taken includes an opportunity to canvass the correctness of the reasons for coming to that conclusion. A civil servant can show cause by pleading that the Tribunal's report is vitiated by gross irregularities committed by it or by violating the principles of natural justice such as preventing him from examining his witnesses or cross-examining his witnesses or cross-examining the witnesses who spoke against him or similar others. If the finding of the Tribunal is the basis for the proposed punishment, he can also attack the correctness of the finding by showing

that the finding was not based on the evidence or is not supported by evidence."

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At another place it is observed :

"The person dealing with the enquiry at any stage is in the position of a Judge, and the rules of natural justice demand that he should not himself be personally interested in the case. . . . He should not have prejudged the issue. . . . He cannot act both as a Judge and a witness. . . . There is no bar to a person issuing the show cause notice to try it himself. The principle that a prosecutor cannot be a Judge is not strictly applicable to departmental enquiries. . . . But he must not lower himself to the status of a common prosecutor, that is to say, of a person who feels it a part of his function to bring the guilt home to the accused at any cost. He must act with the detachment of a Judge, since he is professing to exercise that dignified function. . . .

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If those fundamental principles are not followed by the Government in selecting a person to make an enquiry, the enquiry would be a farce and would not in any sense of the term be said to give a reasonable opportunity to the officer concerned to defend himself."

At page 418, of the report, it is further remarked that :

"Rightly or wrongly when the petitioner was under a reasonable apprehension that the enquiry was the result of a preconceived plan and a concerted action on the part of the Medical Department, his request for professional help was certainly justified and, enquiry officer should have given him that opportunity. His refusal to accede to that simple request has certainly deprived the petitioner in the circumstances of the case of an opportunity to defend himself."

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In the result, therefore, I allow this petition with cost and quash the order of the Chief Engineer, Local-Self Government, Engineering Department, dated the 2nd of November, 1955, and the order of the State Government, dated the 16th of November, 1956, rejecting the appeal of the petitioner, and further direct the opposite parties to treat the petitioner as continuing in service.

Application allowed.

APPELLATE CIVIL

Before Mr. Justice Desai and Mr. Justice Beg

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AMOD KUMAR VERMA (PLAINTIFF)

v.

HARI PRASAD BURMAN AND OTHERS (DEFENDANTS)

Arbitration Act, 1940. s. 33—*Application to set aside award—Decree on award—No jurisdiction to pass.*

No decree on the basis of an award can be passed in a proceeding under s. 33 of the Arbitration Act, 1940, as all that has to be seen there is whether the award deserves to be set aside or to be remitted.

Case-law discussed.

First Appeal from Order No. 101 of 1950, (connected with F. A. F. O.s Nos. 102, 155 and 156 of 1950), from an order of Ahmad Mirza, Additional Civil Judge, Banaras, dated 30th January, 1950.

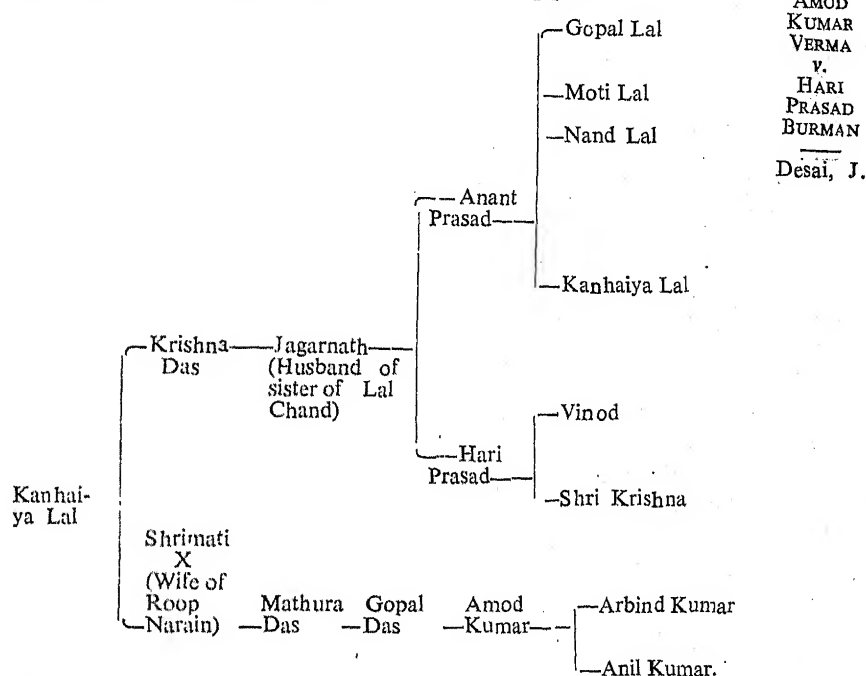
The facts appear in the judgment.

Ch. Kedar Nath, Krishna Shankar and O. N. Mehrotra for the appellant.

Dr. N. P. Asthana, J. Swarup, R. S. Pathak, H. N. Seth and Sunder Lal for the respondents.

DESAI, J. :—This is an appeal from an order of a Civil Judge, Banaras, refusing to set aside an award of arbitrators and passing a decree on its basis in Suit no. 54

of 1947. The pedigree given below shows the relationship existing among the parties to the appeal.



In 1841, the descendants of Kanhaiya Lal, through his son and daughter, who naturally were members of two families, started a joint money business in the name of Mathura Das Krishna Das. In the evidence this business is referred to as "Kothi business". On 24th June, 1934, the firm Mathura Das got itself registered as a partnership firm under the same title. Later it started two more businesses, (1) in Kalabattu, and (2) in Banarsi Saris; the Kalabattu business was known as Kumar Kalabattu Karkhana, (named after Amod Kumar), while the Banarsi Saris business was known as Jagarnath Das Barman, and was in partnership with a stranger to the family named Jiwan Das. On 22nd November, 1935, Jiwan Das, who was the working partner, died and the firm Jagarnath Das Barman was dissolved, though the business in Banarsi Saris continued in the hands of the firm Mathura Das Krishna Das. In 1935 the

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members of the two branches divided the three businesses among them by a mutual agreement; the Kalabattu business was given exclusively to Amod Kumar, the Banarsi Sari business was given exclusively to Hari Prasad and Anant Prasad and each of them was to pay interest to the firm Mathura Das Krishna Das for the capital invested by it in the two businesses. The agreement was in writing. On 31st March, 1935, Anant Prasad executed a will or family settlement laying down that the *kothi* business should be run jointly by the two branches, that the Banarsi Saris business would be done by him and his heirs exclusively, and that the Kalabattu business would be done by Amod Kumar exclusively. In 1937, he died and Hari Prasad assumed control of everything, excluding the Kalabattu business.

Then differences arose between Hari Prasad, Anant Prasad's sons and Amod Kumar and on 19th March, 1942, they entered into an arbitration agreement, appointing Keshav Deo, a relation, as the sole arbitrator to decide the question of partition of Mathura Das Krishna Das. The arbitrator could not effect complete partition within the time allowed under the arbitration agreement. So on 4th April, 1943, the parties executed another arbitration agreement, giving further time to the arbitrator to carry out the partition. The arbitrator settled some disputes between the parties and even made some sort of an interim award, but did not make any formal award. On 23rd April, 1945, Amod Kumar, Hari Prasad, Kanhaiya Lal, Nand Lal, Moti Lal and Gopal Lal executed a third agreement, referring the disputes over the partition of the Mathura Das Krishna Das and movable and immovable property to the arbitration of Vishnu Das and Lal Chand. The arbitrators were authorized to appoint a Sarpanch and complete the partition within six months from the date of agreement and get the award registered; they were given unlimited power to fix the shares of the parties and settle everything by open and secret inquiries and examination of the account books of the parties. The arbitrators could not make the award within the time allowed and on 23rd

July, 1945, the parties executed another agreement, extending the time. On 2nd August, 1945, they executed a third agreement, extending the time further and revising some of the conditions of the original agreement. The two arbitrators appointed one Debi Prasad as the Sarpanch, but subsequently Debi Prasad resigned and the arbitrators appointed one Nand Kishore as the Sarpanch. On 21st September, 1946, the arbitrators made their award and got it registered on the next day. It was not signed by the Sarpanch Nand Kishore. The arbitrators on 23rd September, 1946, gave notice of the making of the award to the parties. On 1st November, 1946, Hari Prasad asked the arbitrators to file the award in court and they expressed willingness to do so, but before they could do so, Gopal Lal instituted suit no. 157 of 1946 in the trial court on 22nd November, 1946, for a decree on the basis of the award. He got a commissioner appointed by the trial court to go to the house of Lal Chand arbitrator and seize the award and produce it before the court. Accordingly the trial court issued a commission to a lawyer, who in execution of it obtained the delivery of the award and produced it in the court. On 17th March, 1948, the suit was dismissed in default and neither Gopal Lal applied for its restoration, nor he or any of the parties to the suit, (all the parties in this appeal were parties in that suit), preferred an appeal from it. On 16th December, 1946, Hari Prasad also instituted a suit, (Suit no. 164 of 1946), purporting to be under section 14 of the Indian Arbitration Act, 1940, for the award being made a rule of the court. He also impleaded all the persons who were parties to the arbitration agreement. Since the award had already been produced in the court by the Commissioner in Suit no. 157 of 1946, he could not pray for the filing of the award; he stated in paragraph 8 that the arbitrators were taking action at his request to file the award in the court under section 14 (2) and that before they could do anything the Commissioner went to Lal Chand and took possession of the award and produced it in court and the relief sought in the suit was that a decree be

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passed on the basis of the award already filed in court. Summonses were issued to the parties and on 3rd July, 1947, Amod Kumar, Kanhaiya Lal, etc., objected. On 14th May, 1948, Hari Prasad's counsel stated that the suit was under section 14 (2) for getting the award filed in court, that as the award had already been filed, the purpose of the suit was achieved, that the relief of making the award a rule of the court had become superfluous and that nothing remained to be done in the suit. The court observed that the award had been filed in another case, that it could not be made a rule of the court under section 14 (2) and Hari Prasad also did not want it to be made a rule of the court and that nothing remained to be done in the suit and dismissed it. Hari Prasad on 22nd March, 1948, applied for review of the order seeking a decree on the award, but it was rejected on 27th November, 1948, because there was no error apparent on the face of the record and there was no other sufficient reason for review.

I now come to the suits, which gave rise to this appeal. On 10th March, 1947, Amod Kumar, applied under section 33 for the setting aside of the award on several grounds; the suit was numbered as 54 of 1947. The other suit was no. 86 of 1947, instituted by Kanhaiya Lal, on 16th May, 1947, under section 33 for the setting aside of the award. Hari Prasad filed objections in the two suits, but did not ask for a decree on the basis of the award. In reply to the contentions of Amod Kumar and Kanhaiya Lal that the award was fit to be set aside on account of various reasons, he did affirm in his pleadings that far from being fit to be set aside, it was fit to be made a rule of the court, but did not expressly or even impliedly pray for a decree on the basis of the award. The award was in the record of Suit no. 157 of 1946, which was requisitioned by the trial court from the record room. On 30th January, 1950, it dismissed both the suits, refused to set aside the award and passed the following order :

“ Let this award be made a rule of the court and a decree in terms of the same be passed.

The said order be made a part of the decree." 1957

Accordingly, a clerk of the court prepared a decree. No judgment was pronounced on the award and the decree that has been prepared simply reproduced the last few words of the order, dated 30th January, 1950 ; its operative portion is as follows :

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"Objection dismissed. The award is accepted and is made, rule of the court and a decree be prepared."

The present appeal is filed by Amod Kumar against the order of the trial court, dated 30th January, 1950, dismissing his Suit no. 54 of 1947. F. A. F. O. 155 of 1950 is by Kanhaiya Lal and his brothers Nand Lal and Moti Lal from the same order. F. A. F. O. no. 102 of 1950 is by Amod Kumar from the order of the trial court in Suit no. 86 of 1947, and F. A. F. O. no. 156 of 1950 is by Kanhaiya Lal from the same order. Thus Amod Kumar, Kanhaiya Lal, Nand Lal and Moti Lal have made a common cause and are the appellants before us ; their appeals are contested by Hari Prasad respondent.

The appellants challenge the order of the trial court, refusing to set aside the award on several grounds. They also challenge its passing a decree on the basis of the award on several grounds. Their counsel stated before us that if the decree passed by the trial court was set aside by us, their object would be served and they would not press for the award being set aside. The award can be enforced only through a decree passed under section 17 ; so long as there is no decree passed on its basis, the appellants are not aggrieved by its mere existence. In view of the statements made by counsel of the appellants, we did not think it necessary to hear them at this stage on the question whether the award was fit to be set aside or not ; we heard them only on the question whether the decree would be passed on its basis. We have heard *Sri Jagdish Swarup* appearing for the respondent Hari Prasad and I am satisfied that

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the trial court had no jurisdiction to pass the decree. For the reasons that I shall give presently I am of the view that a decree on the basis of an award can be made only under section 17, that the provisions of section 17 can be applied only in a proceeding started with an application under section 14 and that in a proceeding started under section 33, when no proceeding started under section 14 is pending, no decree can be passed, and the only order that can be passed is one refusing to set aside the award. Even apart from the question of jurisdiction, I am of the view that the trial court had no justification to pass the decree without any prayer for the same by any of the parties to the arbitration agreement, without the question whether a decree could be passed or not being discussed or considered, without hearing the appellant on the question and in spite of the dismissal of the suits of Gopal Lal and Hari Prasad under section 14.

Chapter II of the Arbitration Act lays down the provisions dealing with arbitration without intervention of a court. When the arbitrators have made their award, they are required by section 14 (1) to sign it and to give notice to the parties of the making and signing it. Under sub-section (2), they are required, at the award or a signed copy of it to be filed in the court, and upon payment of their fees and charges, to cause the award or a signed copy of it to be filed in the court, whereupon the court has to give notice to the parties of the filing. Section 15 authorizes the court to modify or correct an award in certain circumstances, and section 16 to remit it from time to time to the arbitrators for reconsideration and return within the time fixed. Section 17 provides that "Where the court sees no cause to remit the award . . . or to set aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground

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that it is in excess of, or not otherwise in accordance with, the award. These are the relevant provisions of Chapter II. Chapter III deals with arbitration with intervention of a court when there is no suit pending. Section 20 is the only section in the chapter and provides for an application to be made in the court for appointment of an arbitrator in accordance with the agreement; sub-section (5) lays down that the arbitration shall then proceed in accordance with, and shall be governed by, the other provisions of the Act, so far as they can be made applicable. In other words, sections 14 to 17 will apply to the award made by him. Chapter IV deals with arbitration in suits; section 23 provides for an order by the court referring the matter in difference to arbitration, and section 25 provides for the provisions of the other chapters applying to the arbitration so far as they can be made applicable. Chapter V contains general provisions which apply to all arbitrations, whether with or without intervention of a court or whether in a pending suit or otherwise. Section 30 states the ground on which alone an award can be set aside. Section 31 (2) lays down that all questions regarding the validity, effect or existence of an award, (or an arbitration agreement), shall be decided by the court in which the award has been, or may be, filed and by no other court; sub-section (4) lays down that where in any reference an application under the Act has been made in a court competent to entertain it, that court alone shall have jurisdiction over the arbitration proceedings and subsequent applications arising out of the reference and the arbitration proceedings. Section 32 bars a suit on any ground whatsoever for a decision upon the existence, effect or validity of an award, (or an arbitration agreement), and lays down that no award shall be set aside, amended, modified or in any way affected otherwise than as provided in the Act. Section 33 confers upon any party desiring to challenge the existence or validity of an award or to have its effect determined the right of applying to the court for the same. If he succeeds in satisfying the court that any of the grounds mentioned

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in section 30 exists, the court will set aside the award. Chapter VI deals with appeals ; section 30 provides for an appeal from an order setting aside or refusing to set aside an award and certain other orders and bars an appeal from any other order. Chapter VII is the last chapter, section 41 of which makes the provisions of Code of Civil Procedure applicable to the proceedings before the court. The only provisions of the Code of Civil Procedure to which reference may be made are the provisions which provide for appeals from decrees of Civil Judges. All that is required to complete this statement of the relevant law is to refer articles 158 and 178 of the Limitation Act. Article 158 lays down that an application to set aside an award or to get it remitted must be filed within thirty days of the date of service of the notice of the filing of the award, [given under section 14 (2) of the Arbitration Act], and Article 178 lays down that an application under section 14 (2) for the filing in the court of an award must be made within ninety days of the date of service of the notice of the making of the award, [given under section 14 (1)].

Since no suit lies for a decision upon the effect or validity of an award, no suit can be filed to enforce an award. The Legislature has, therefore, provided for the passing of a decree on the basis of an award so that a party to whom some benefit has been given under the award can avail itself of it by obtaining a decree on the award and executing it. Section 17 is the only section under which a decree can be passed on the basis of an award. Though there are no words in section 17 expressly connecting it with the previous provisions, it is to be read not in isolation, but in conjunction with sections 14, 15 and 16. From the contents of sections 14 to 17 and their context it is evident that the scheme of Chapter II is that when an arbitrator makes the award, he must inform the party so that they may within the time prescribed in Article 178 of the Limitation Act apply to the court for an order to the arbitrator to file it in the court. The award is to be filed in the court by the arbitrator in compliance with an order of the

court, if he has not filed it already at the request of either of the parties, and the court after summoning the parties has to decide whether it requires to be modified or remitted or set aside. If any party desires that the award be set aside, he must apply to the court within the time prescribed by Article 158 of the Limitation Act. The words "the court" in section 17 do not mean any of the courts having jurisdiction to decide the questions forming the subject matter of the reference : they mean the particular court in which the award has been filed under section 14 (2). Section 17 certainly does not confer jurisdiction upon any court to pass a decree on the basis of an award, regardless of whether its jurisdiction has been invoked under section 14 by the arbitrator's filing the award or by any party's application for its being filed. Surely a court before which an award has been produced for any reason has no jurisdiction to pass a decree on its basis merely because it has jurisdiction to decide the questions forming the subject matter of the reference. For instance, if an award is produced before such a court in order to supply proof of handwriting, it would not have jurisdiction to pass a decree on its basis. A decree is to be passed only when the court sees no reason to remit the award or set it aside and the power to remit the award is conferred by section 16 ; so the provisions of section 17 are connected with those of section 16. There can be no question of the court's remitting the award under section 16 or of its modifying or correcting it under section 16 unless it has come within its jurisdiction, and section 14 (2) is the only provision by which it is brought within its jurisdiction. All that is laid down in section 14 (2), is that the court must give notice to the parties of the filing of the award ; what it should do thereupon is not laid down in it. If sections 15, 16 and 17 are not the sections which lay down what it should do, it would mean that there are no provisions in the Act laying down what the court should do with the award ; that would surely be an absurd position. There can, therefore, be no doubt that sections 15, 16 and 17 prescribe the acts that can be done by the court

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in which the award has been filed under section 14 (2). That the four sections are to be read as connected with one another also follows from the fact that the only prayer that a party should make in his application under section 14 (2) is that the award be filed in court ; he is not required to pray for the passing of a decree on the award, or for its being remitted or set aside or corrected. The law contemplates that a decree will be passed on the basis of the award in the ordinary course or it will be set aside or remitted. Once the award has been filed in court, the law will take its course and a decree will be passed, if the award is found to be in order.

When a definite procedure from the filing of an award up to the making of a decree is laid down in the chapter dealing with arbitration without intervention of a court and it contains no provision expressly allowing a decree to be passed in any other manner, it follows that a decree can be passed under section 17 only in a case starting with the filing of the award or with an application for filing of the award under section 14. Section 31 (1) is to the effect that an award may be filed in any court having jurisdiction in the matter to which the reference relates. Of course the word "court" itself is defined in the Act to mean a civil court having jurisdiction to decide the questions forming the subject matter of the reference, if the same had been the subject matter of a suit, but more than one civil court may have jurisdiction to decide the questions forming the subject matter of the reference and section 32 lays down that the award may be filed in any of them. What is significant is that the Act lays down in which of the civil courts having jurisdiction an award may be filed, but does not lay down which of the civil courts having jurisdiction can make a decree on the basis of it. The reason is not far to seek ; once the award has been filed in one court having jurisdiction, no other court has jurisdiction to make a decree. Section 33 (3) itself states that no application arising out of the arbitration proceedings can be made to a court other than the court in which the award has been filed.

Section 14 (2) contemplates the filing of the award in the court by the arbitrator ; it is not essential that he should himself take it to the court and it is enough if he causes it to be filed. It is true that no formality in the act of filing the award is required ; the arbitrator need not make an application for permission or leave to file the award. He can just file the award in the court without any application, but the act of filing must be his or on his behalf ; if somebody else files it without his authority or not on his behalf, so that he cannot be said to have caused it to be filed, it is not an act to be taken notice of by the court. The effect of section 14 (2) is that the court is bound to receive the award and to proceed as laid down in it and the subsequent sections, but cannot be expected to do so whenever an award is produced before it by any person ; therefore, the Legislature has laid down that it must be filed or caused to be filed by the arbitrator himself. An arbitrator cannot be said to have caused the award to be filed unless he delivers it to another person with a direction to file it or direct the person, who has custody of it, to file it. He must intend to file it and must do an act which results in its being filed ; otherwise ; he cannot be said to have caused it to be filed. If an arbitrator simply hands over the award to a party, even if he knows or has reason to believe that the party will file it in the court and it files it, so long as he has not expressly authorized it to file it, he cannot be said to have caused it to be filed. If some other person files it, he must do so as the arbitrator's agents, or, as observed by the Supreme Court in *Kumbha Mawji v. Union of India* (1), he, should have his authority. In that case the arbitrators handed over the award to a party and the party filed it in the court ; yet the Supreme Court held that the arbitrators did not cause it to be filed, because the party had no authority from them to file it. In *Lachmi Prasad v. Gobardhan Das* (2), MUKHARJI, J., observed that the filing of an award by an arbitrator is a mere ministerial act, that no solemnity attaches to it

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(2) A. I. R. 1948 Pat. 171.

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and that when he files the award he is doing an act which the statute requires him to do. But it does not follow that anybody else can do the act without his authority and yet he can be deemed to have caused it to be done. The court cannot ignore the words "cause it to be filed". In that case in a proceeding started with an application under section 33, the arbitrator appeared and filed the award in the court and it was held that the filing would be deemed to be filing under section 14. The present case is distinguishable from that case, because here the award was not filed by the arbitrator himself. The trial court obtained it from the record room; nobody filed it before it. In the previous suit, no. 157 of 1946, it had been produced before it by the Commissioner, who had been directed to seize it from the arbitrator. We do not know how the Commissioner got possession of the award, whether Lal Chand voluntarily handed it over to him or whether he attached it from his possession. We cannot assume that Lal Chand voluntarily handed it over to him, because there are no data on which we can make this assumption, particularly when a commissioner was deputed to go and seize it. If the Commissioner seized it and then produced it in the court, it cannot possibly be held that the arbitrator caused it to be filed. Even if the arbitrator handed it over to the Commissioner on the latter's showing him the writ of commission and the Commissioner produced it in the court, he cannot be said to have caused it to be filed, because he did not authorize it to be filed. The Commissioner was an officer of the court and could not be deemed to be the arbitrator's agent; he was on the contrary sent to do an act of aggression against him. It was found in the earlier suit that there was no filing of the award and that no decree could have been passed. The trial court has wrongly stated in its order that the award was filed in the court by the arbitrator; this was a serious mistake which might have affected the final order passed by it.

Sri Jagdish Swarup vehemently argued that an award can be filed in the court by a party also. He

referred to the provisions of section 38, which allow a party to apply to the court for an order that the arbitrator shall deliver the award to it on payment of his fees and argued that the only object behind the party's being given the right to obtain the award from the arbitrator must be that it can file it in the court and obtain a decree on it. The Act does not provide for the award coming before the court if the arbitrator dies or refuses to file it in the court or has filed it in another proceeding or has delivered it to a party who refuses to file it in the court. An award is useless unless it is followed up by a decree ; prior to the passing of the Arbitration Act of 1940 an award could be sued upon, but now a suit to enforce an award is barred. It was contended that if the award can be filed in the court by the arbitrator and not by any of the parties, the making of the award would in some cases be rendered futile. There is undoubtedly much force in the contention that if the law is that the award can be filed in the court only by the arbitrator, the making of it would be rendered futile in some cases ; but our jurisdiction consists in interpreting the law and not enacting a law. The arguments that have been advanced are for legislating that a party should be given the right to file the award in the court, but would not justify a court's interpreting section 14 to mean that the award can be filed by a party also. The only right that has been given to a party is to apply to the arbitrator to file the award in the court ; there are no words which are capable of being interpreted to mean that it also has the right to file it in the court. The Arbitration Act, which consists of only 49 sections, cannot be expected to provide for the myriads of circumstances that can be imagined to exist ; as a matter of fact no law can be expected to achieve this. If an arbitrator is determined to destroy the award as soon as he makes it, no law can prevent his doing it. Moreover, some of the difficulties pointed out by Sri Jagdish Swarup are really not insurmountable. If the award is stolen from the possession of the arbitrator, he may be able to file a signed copy of it in the court. An award affecting immovable property worth more than Rs.100 is required to be regis-

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tered ; if the arbitrator loses the award or if he has delivered it to a party who refuses to hand it over back to him or if he has produced it before some tribunal for some other purpose, he can always obtain a copy from the Registration Department and file it in the court. Even in the present case, it was not impossible for the arbitrators to comply with the direction of the court if given under section 14 (2); even though the award had been seized by the Commissioner, they could be directed by the court to file it, and they could either file a signed copy of it or authorize the Commissioner or the court, that had issued the commission, to file the award in the court. I have pointed out earlier that if a person, who has the actual custody of the award, is directed by the arbitrator to file it in the court and complies with it, the arbitrator has caused it to be filed in the court. It must be conceded that in some rare cases the arbitrator will not be in a position to file the award or cause it to be filed ; but it would be for the Legislature to provide for a decree being passed on the basis of the award in such cases. If the law is defective inasmuch as it does not provide for such contingencies, the defect cannot be removed by the court, and certainly not by misinterpreting the provisions of section 14. The Supreme Court has clearly held in the case of *Kumbha Mawji* (1) that a party cannot file the award in the court except under the arbitrator's authority. It was only in the alternative that the Supreme Court observed that the High Court of Calcutta had proceeded on the footing that the filing of the award by a party was not sufficient compliance of section 14 (2) and that it was not argued before the Supreme Court that the assumption of the High Court was erroneous.

The trial court has passed the decree in a proceeding commencing with an application for the setting aside of the award ; there was no proceeding pending before it when the application was made. The proceedings instituted by Gopal Lal and Hari Prasad through the applications for the filing of the award had ended and

(1) 1953 S.C.R. 878.

were not pending at the time of the application for the setting aside of the award. In *Bengal Jute Mills Company, Ltd. v. Jewraj Hiralal* (1) and *Ratanji Virpal and Company v. Dhirajlal Manilal* (2) an application to set aside the award before the filing of the award under section 14 was ruled out as incompetent. In *Rashid Jamshed Sons and Company v. Moolchand* (3) it was held that a party aggrieved by the award can challenge it only through an application under section 33 and must proceed under section 14. Of course, there is nothing in section 33, which confers upon a party the right of challenging the award by an application, to make the right dependent upon the award being previously filed in the court; on the other hand the language is wide enough to permit an application even before the award has been filed in the court. The Limitation Act simply provides for limitation for suits, appeals and applications; it does not confer rights to institute suits, appeals and applications. Therefore, Article 158 simply prescribes the period of limitation for an application under section 33 to set aside an award but does not create the right to make such an application; as I said earlier, the right has been conferred by section 33 of the Arbitration Act. Therefore, it cannot be argued from the fact that Article 158 permits such an application to be made at any time within 30 days from the date of service of the notice of the filing of the award, that it can be made only after the receipt of the notice. If an application is made more than 30 days of the receipt of the notice, it should be dismissed as barred by time, but if it is made before the receipt of the notice, it may not be rejected as premature. On the other hand, it is true that a party does not suffer merely from the making of the award; so long as no decree has been passed it does not matter whether the award has been made or not. We are not called upon to decide the question here; but if it is true that an application for the setting aside of the award cannot be made unless it has first been filed in the court, it supports the view that a decree cannot be passed on the

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(1) A. I. R., 1944 Cal. 304. (2) A. I. R. 1942 Bom. 101.
(3) A.I.R. 1945 Mad. 371.

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basis of an award unless it has been filed in the court under section 14. So long as the award has not been filed in the court, there is no threat to the rights of any party and, therefore, none would have any cause of action to apply for the setting aside of the award. The threat arises only when the award is filed in the court because then a decree might be passed on its basis, and hence the right to apply for the setting aside of the award has been granted.

A proceeding for the setting aside of an award is a proceeding which commences with an application for the same and terminates when the court sets aside the award or passes an order refusing to do so. An application to set aside the award is expressly provided for in the Act and the only orders that are permitted by the Legislature to be passed are (1) setting aside the award and (2) refusing to do so. The very nature of the application precludes the possibility of any third kind of order, such as making the award a rule of the court. It is irrelevant to consider whether a proceeding for the setting aside of the award is a part of the proceeding started with an application under section 14, or a proceeding independent of it; in either case it will be in the proceeding started with an application under section 14 that a decree on the basis of the award will be passed. There is no substance in the contention of *Sri Jagdish Swarup* that because in a proceeding for the setting aside of the award, and all the parties to it are before the court, it has jurisdiction to pass a decree on the basis of the award if it is not set aside. Section 17 certainly does not lay down that whenever an award is before the court and it does not see reason to remit it or to set it aside, it can pass a decree. The very condition expressly laid down in section 17 that no decree can be passed until the time for applying under section 33 has expired or the application has been rejected means that the decree is to be passed in the proceeding started under section 14. If in a proceeding started under section 33 a decree on the basis of the award could be passed, it would have been essential to provide in section 17 one more condition that no decree has already been passed in the proceeding for

the setting aside of the award. A proceeding under section 33 may be made a part of the proceeding under section 14, but a proceeding under section 14 cannot be made a part of a proceeding under section 33 and it seems to me absurd to apply the provisions of section 17 in a proceeding under section 33. All that has to be seen in a proceeding under section 33 is whether the award deserves to be set aside or to be remitted ; the question whether a decree should be passed on its basis is not within the scope of the inquiry in the proceeding. When a party applies for the setting aside of an award, it is only required to make out a case for its being set aside ; it is not required in addition to make out a case for its not being made a rule of the court. When it applies for a direction under section 14 to the arbitrator to file the award, a decree on the basis of the award will follow if the award is not set aside or remitted, but that would be by operation of the express law. There is no such operation of the law, when it applies under section 33. A prayer for the passing of a decree on the basis of the award may be implied in the prayer for the filing of an award, but not in an application under section 33 for the setting aside of the award ; on the contrary, passing a decree would be quite the reverse of what he prays for. In view of the bar imposed by section 32 on an application for the setting aside or amendment of an award or for having it affected in any way, no application for the passing of a decree on the basis of the award can be filed. The necessity for such an application is obviated by the operation of the provisions of sections 14, 15, 16 and 17. The Limitation Act also prescribes no period of limitation for an application for a decree. Therefore, no application can be made at all for the passing of a decree in a proceeding under section 33. In any case there was no such application made by any party and the trial court *suo motu* passed the decree. It did not give any opportunity to the appellants to show cause why a decree should not be passed and the decree passed against them, without hearing them, cannot be sustained.

If Kanhaiya Lal and Amod Kumar had withdrawn their applications under section 33, the trial court would

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have had jurisdiction to pass a decree. Dismissal of the applications on merits is not distinct from dismissal with consent or an withdrawal and the trial court did not acquire jurisdiction to pass a decree merely because it dismissed them on merits.

The view that no decree can be passed in a proceeding under section 33 is supported by two authorities, (1) *Balwant Singh v. Ram Charan Singh* (1) and *Gopi Chand v. Lal Chand* (2). It was held in the former case that sections 14, 15, 16 and 17 are to be read together and that their provisions cannot be applied in a proceeding under section 33. What happened there was that the trial court did not pass a decree after refusing to set aside the award and in the appeal it was urged that it was bound to pass a decree. A Bench of this Court held that it was not. Since the contention was that the trial court was bound, this Court held that it was not, though the reasons given by it show that it had no jurisdiction also. This Court also referred to the fact that no application for the passing of a decree was made; this reference was by way of obiter. Whether the trial court could have jurisdiction if an application had been made is not at all discussed, and there is nothing in the judgment to suggest that this Court would have upheld the decree if it had been passed on an application by the opposite party. In the PEPSU case an application under section 33 was dismissed as barred by time; then the opposite party made an application under section 17 for the passing of a decree and it was held that no decree could be passed. The learned Judges followed the decision in the case of *Balwant Singh* (1) and observed that section 17 does not require that whenever a court passes an order refusing to set aside the award, it must pass a decree on the basis of the award. I respectfully differ from the contrary view taken in the case of *Lachmi Prasad* (3). I do not understand how an application under section 33 can be treated as an application under section 14 for the filing of the award merely because it is within the prescribed period of limitation. Whether an application is

(1) A. I. R. 1944 All. 188.

(2) A. I. R. 1956 Pep. 74.

(3) A. I. R. 1948 Pat. 171.

under one provision or another depends upon its contents and not upon whether it is within the period of limitation prescribed for an application under one provision or the other.

Rightly or wrongly, the application of Gopal Lal and Hari Prasad under section 14 had been dismissed and the orders have become final. Hari Prasad expressly sought a decree on the basis of the award through his review application and it was rejected. There must be an end to litigation and apart from the doctrine of *res judicata* contained in section 11, Civil Procedure Code, Hari Prasad could not be allowed to apply again for a decree. If he could not apply for a decree, he certainly could not get a decree on somebody else's application. It is immaterial that his application was dismissed with his consent. Even if he had withdrawn his application, he would have been stopped from bringing a second application. In any case it was unsound on the part of the trial court to pass a decree *suo motu* after having refused to pass it in a previous proceeding.

There is no judgment pronounced by the trial court. It has only passed an order refusing to set aside the award and at once passed a decree. The decree is null and void in the absence of a judgment. After refusing to set aside the award, the trial court ought to have pronounced a judgment on the merits of the disputes between the parties as settled by the award.

Though the trial court has ordered a decree to be passed, no decree has been prepared yet. What purports to be a decree is nothing but a formal order; it reproduces the operative words of the order of the trial court. It is on the form of a decree but that would not convert it into a decree, if according to its contents it was not a decree. I do not understand how it can be treated as a decree, when it itself directs a decree to be prepared. Since a decree is to be prepared in compliance with it, it itself cannot be a decree. Since there is no decree, the bar imposed by section 17 on an appeal does not operate. Moreover, section 17 bars an appeal from a decree (except on the ground of its being in excess of the award)

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only if the decree is passed in a proceeding governed by sections 14, 15, 16 and 17. Surely, if some court passed a decree on the basis of an award without having jurisdiction or without the award having been filed properly before it, it cannot be contended that no appeal would lie from it except on the ground that it is in excess of the award. It is true that there is no right of an appeal from any order except an order setting aside or refusing to set aside the award. Here the appeal is from an order refusing to set aside an award, but when disposing of the appeal it is open to this Court to set aside any consequential or incidental order passed by the trial court. Even if the order refusing to set aside the award is maintained on appeal, any consequential or incidental order passed by it without jurisdiction or wrongly can be set aside. In any case, it can be set aside by us in exercise of our revisional jurisdiction and we can exercise our revisional jurisdiction, while exercising our appellate jurisdiction. It is not essential that there should be an application under section 115, Civil Procedure Code, before we can exercise our revisional jurisdiction. Revisional jurisdiction is certainly discretionary, but in the present case there is every reason for our exercising it to set aside the order of the trial court, which was not only without jurisdiction but also against the principle of estoppel and the principle of natural justice that no order should be passed against a person without giving him an opportunity to be heard. *Sri Jagdish Swarup* pleaded that if substantial justice had been done by the direction of the trial court that a decree shall follow we should not interfere, but justice ought to be done in accordance with the law, and moreover, since we do not know the merits of the disputes between the parties, we are not in a position to say that the decree is in accordance with the legitimate rights of the parties. Even if the formal order were treated as a decree, we would have jurisdiction to set aside the decree. Section 17, as said already, does not bar an appeal from any decree passed in any circumstance whatsoever; it bars an appeal only if the decree was passed in a proceeding under sections 14, 15, 16 and 17. If it was passed in another proceeding, it

would be appealable as a decree under the Code of Civil Procedure.

The appeal should be partly allowed, the order of the trial court that the award be made a rule of the court and a decree in terms of the same be set aside, and the rest of the order be maintained. The order set aside was passed by the trial court *suo motu* but the contesting respondent Hari Prasad has supported it in vain and he should be made to bear half of the appellants' costs of the appeal.

BEG, J :—I agree.

By the Court—We partly allow the appeal, set aside the order of the trial court that the award be made a rule of the court and that a decree in terms of the same be passed, and maintain the rest of the order. We order that the appellants will get half of their costs of the appeal from the contesting respondent Hari Prasad.

Appeal partly allowed.

CIVIL REVISION

Before Mr. Justice Desai and Mr. Justice Beg

THE NEW SINGHAL DAL MILL (DEFENDANT)

v.

FIRM SHEO PRASAD JAINTI PRASAD (PLAINTIFF) November, 1

Provincial Small Cause Court (U. P. Amendment) Act, 1957
amending s. 25, Provincial Small Cause Court Act 1887
effect of—Suitor's right, if any, under s. 6, cls., (c), (e), U.P.
General Clauses Act, 1904.

A S. C. C. suit, instituted in 1956, was decreed on 27th April, 1957. Provincial Small Cause Court, (U. P. Amendment Act, 1957), (assented to by the President on 30th May, 1957 and published in the *Gazette* on 4th June, 1957), amended s. 25, Provincial Small Cause Court Act, substituting "District Judge" in place of "High Court". On 27th July, 1957, application in revision filed by the defendant in the High Court.

Upon a preliminary objection that the revision application should have been filed in the court of the District Judge.

Held (i) that the alleged right to apply in revision was not the same thing as a right of appeal;

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(ii) that applying in revision is not continuation of proceedings commenced in the Small Cause Court;

(iii) that no right or privilege was acquired by or accrued in favour of the applicant before the Amendment Act within the meaning of s. 6, cls. (c), (e), U. P. General Clauses Act;

(iv) that the Amendment Act did not contain any provision restricting it to orders passed after it came into force;

(v) that the right to apply may be said to have been left intact, only the forum has been changed;

(vi) that the right to revise vested in the District Judge. Case-law discussed.

Civil Revision No. 867 of 1957 from the decree of Prem Narain Goel, Small Cause Court Judge, Agra, dated 27th April, 1957.

The facts appear in the judgment.

A. Banerji and *K. C. Agarwal* for the applicant.

Gopal Behari and *Virendra Swaroop* for the opposite party.

DESAI, J. :—This is an application for revision under section 25 of the Small Cause Courts Act a decree passed by a Court of Small Causes. The decree was passed on 27th April, 1957, in a suit instituted in 1956 in the Court of Small Causes. Section 25 of the Small Cause Courts Act, as it then existed, laid down that the High Court for the purposes of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, might call for the case and pass such order with respect thereto as it thought fit. The U. P. Legislature passed the Provincial Small Cause Courts (U. P. Amendment) Act, (no. VII of 1957), which amended section 25 by substituting the words "the District Judge" in place of the words "the High Court", "himself" for the word "itself" and "he" for "it". The U. P. Act received the President's assent on 30th May, 1957, and was published in the *Gazette* of 4th June, 1957. It was to come into force at once; so it came into force on 4th June, 1957. The present application was filed in this Court on 27th July, 1957, and a preliminary objection has been raised by the opposite party to its maintainability. The opposite party pleads that after the amendment of section 25, no application for revision can be filed in this Court and

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that this application ought to have been filed in the court of the District Judge. In reply it was contended by the applicant that on the date on which the suit was instituted and on the date on which it was decreed against it, an application for revision could have been filed in this Court and that the right of the party to file an application in this Court remained unaffected by the subsequent amendment. It is not in dispute that if the case is governed by the law in force on the date on which the application was filed, it would not be filed in this Court and ought to have been filed in the District Judge's Court and that if it is governed by the law in force at the time of the institution of the suit or at the time of its being decreed, the application would lie in this Court. The Amendment Act does not say anything about its effect or enforcement except that it was to come into force at once. The obvious meaning of the Act coming into force on 4th June, 1957, the date of its publication, is that on and after that date, the District Judge has the power of calling for a case decided by a Court of Small Causes and revising a decree or order made by it. There is nothing in the Amendment Act to suggest that it would not apply to a case instituted or decided before it came into force and it would not be open to us to read any such qualification in it. The law in force on 27th July, 1957, was that the District Judge had the power to revise the order and there was no law in force under which this Court would have the power. Previously this Court had the power, but it was taken away by the Amendment Act before the application was filed.

All the law governing the question is contained in section 6 of the U. P. General Clauses Act. It deals with the effect repeal of Acts. Admittedly, it does not deal expressly with the effect of amendment of an Act, but there is no other law which lays down the effect of amendment of an Act. It cannot be believed that the Legislature provided for the effect of repeal of Acts but did not make any provision for amendment of Acts. Amendment of an Act is certainly not an uncommon or unimportant matter, which need not be provided for; I venture to suppose that amendment of an Act is more

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frequent than repeal of an Act. The question of the effect of an amendment is not different from that of the effect of repeal of an Act and is certainly as important as the other. If it cannot be accepted that the Legislature did not provide for the effect of amendment of an Act, the effect must have been provided for in section 6. Amendment of an Act consists of two steps, (1) of repeal of the provision amended and (2) of enactment of the provision in the amended form. Take the amendment in question; the law empowering the High Court to call for the case and revise the decree or order has been repealed and in its place the law empowering the District Judge to call for the case and revise the decree or order has been enacted. Thus the amendment consists of repeal followed immediately by enactment of another provision. So far as it involves repeal, the effect of the repeal is governed by the provisions of section 6. In *Danmal Parshotamdas v. Baburam Chhoteylal* (1) SULAIMAN, C. J., said at page 7 : "It seems that s. 6 (e) would apply to those cases only where a previous law has been simply repealed and there is no fresh legislation to take its place. Where an old law has been merely repealed, then the repeal would not affect any previous right acquired, nor would it even affect a suit instituted subsequently in respect of a right previously so acquired. But where there is a new law which not only repeals the old law, but is substituted in place of the old law, s. 6 (e), General Clauses Act, is not applicable, and we would have to fall back on the provisions of the new Act itself." With great respect, I cannot agree with this dictum. Section 6 speaks merely of repeal of an Act and it would be unjustifiable for us to say that it refers to a particular repeal, i.e., repeal not followed by re-enactment. The opening words of section 6 itself lay down that the provisions of the repealing Act will over-ride the effect of repeal stated in the section; it is, therefore, not correct to say that when an Act is repealed and another Act is re-enacted, section 6 cannot apply and that the effect of the repeal must be found out from the provisions of the new Act. An Act may be repealed not

(1) A. I. R. 1936 All. 3.

merely by a statute, the only provision of which is that the Act is repealed, but also by a statute which besides repealing the Act enacts provisions to be substituted. As a matter of fact, a majority of repealing Acts are those which re-enact the law. In essence, there is no distinction between such laws and laws which merely profess to amend. If the amendment of the existing law is small, the Act professes to amend; if it is extensive, it repeals the law and re-enacts it. In *Indra Sohan Lal v. The Custodian of Evacuee Property, Delhi* (1) the Supreme Court ruled out the notion that section 6 is inapplicable where a repeal is followed by a fresh Act. The case of *Danmal Purshottamdas* (2) was expressly over-ruled by the Supreme Court in *State of Punjab v. Mohar Singh* (3). The question whether an amendment has retrospective effect or affects past Acts or any situations created by any past Acts has always been decided by reference to the provisions of section 6. Section 6 (c) lays down that repeal of an Act shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Act, and sub-section (c) that it shall not affect any remedy or legal proceeding commenced before the repealing Act shall come into operation, in respect of any such right, privilege, obligation or liability and it may be enforced, and the legal proceeding may be continued and concluded, as if the repealing Act had not been passed. It is under these provisions that the questions whether a party had a vested right and whether the vested right was affected by the repeal of the Act would arise for consideration. I have, therefore, no doubt that we have to look to the provisions of section 6 only for deciding the preliminary objection.

The only provisions of section 6 which may have any application to the facts in the instant case are those contained in clauses (c) and (e). If any right had accrued in favour of the applicant before the Amendment Act was passed, it will not be affected by the amendment because the amending Act does not profess to affect it. The remedy and the legal proceedings

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(1) A. I. R. 1956 S. C. 77. (2) A. I. R. 1936 All. 3.
(3) A. I. R. 1955 S. C. 84.

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which cannot be affected by the amendment must be in respect of a right, privilege or obligation acquired or incurred before the amendment ; such a remedy may be enforced, and such a legal proceeding may be continued and concluded, as if the amending Act had not been passed.

The most important question is whether any right or privilege was acquired by, or had accrued in favour of the applicant before the amendment. It is settled beyond controversy that a right to an appeal is a right that vests in a suit or on the date on which he files a suit or a suit is filed against him and that it cannot be taken away by a subsequent legislation except by using appropriate language. The existence of a vested right to appeal was recognized by the Supreme Court in *Messrs. Hoosein Kasam Dada' (India) Ltd., v. The State of M. P.* (1). An appeal is, however, different from an application for revision, such as one under section 25 of the Small Cause Courts Act or, under section 115, Civil Procedure Code. A right to appeal vests in a suitor on the date of the institution of the suit only if the right has been conferred upon him by a statute because a right to appeal is a statutory right and not an inherent right of a suitor. A suitor has no right to apply in revision ; as a matter of fact, there is nothing like a right to apply in revision. No suitor has a right to require a superior court to revise an order of an inferior court, even where a superior court has been invested with jurisdiction to do so. Section 25 of the Small Cause Courts Act and section 115 of the Code of Civil Procedure confer jurisdiction upon the High Court to call for the record of a case decided by an inferior court and revise its decision in certain circumstances. The right is conferred upon the High Court and no right has been conferred upon a suitor to require the High Court to revise the order. A suitor has a right of appeal to a superior court and the superior court is under an obligation to entertain the appeal and to do anything that an appellate court can do ; it cannot refuse to entertain an

(1) A. I. R. 1953 S. C. 221.

appeal on the ground that it is discretionary with it or to reject an appeal on the ground that though the case for interference has been made out, substantial justice has been done and it will not interfere. It is the right of a superior court to revise an illegal or improper order passed by an inferior court and not a duty ; if it is not its duty, there cannot be a corresponding right elsewhere. Section 25 of the Small Cause Courts Act, like section 115 of the Code of Civil Procedure, does not refer to any party at all ; it does not even refer to any application to be moved by a party for revision ; it just confers power upon the High Court to call for the record and see that the inferior court has acted legally and within its jurisdiction. A High Court has power to superintendence over inferior courts and had a right to see that they keep themselves within their jurisdiction ; its revisional jurisdiction, even though conferred by a statutory provision such as that in section 25 of the Small Cause Courts Act or section 115, Civil Procedure Code, is nothing but an exercise of its supervisory jurisdiction. Some right may vest in a suitor on the date when the suit is instituted but no right will vest in the High Court to exercise its supervisory jurisdiction over the court in which the suit is instituted and it cannot be argued that the High Court's vested right is not affected by the amendment. When the power to revise an order of a Court of Small Causes is withdrawn from the High Court, it does not amount to withdrawing any right of a suitor. No period of limitation is prescribed for an application in revision, either under section 115, Civil Procedure Code, or section 25, Small Cause Courts Act. The reason is obvious ; neither of the two provisions confer any right to apply and no question of limitation would arise, if no act is contemplated or required to be done by a party. The fact that no limitation has been prescribed means that there is no right to apply for revision ; the law of limitation prescribes periods of limitation for enforcement of all rights.

We were referred to some authorities which seem to lay down that a party has a right to apply in revision

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or that a right of appeal includes a right to apply in revision. One of them is *Nagendra Nath v. Suresh Chandra* (1) in which the question for decision was whether under Article 182 of the Limitation Act, the period of limitation for execution of the decree will begin to run from the date of the order in revision by the High Court. The words used in Article 182 are that where there has been an appeal, it begins to run from the date of the final decree or order of the appellate court. Sir DINSHAW MULLA, delivering the opinion of the Board, observed at page 167, "There is no definition of appeal in the Civil Procedure Code, but their Lordships have no doubt that any application by a party to an appellate court, asking it to set aside or revise a decision of a subordinate court, is an appeal within the ordinary acceptance of the term". It may be that the word "appeal", as used in Article 182, Limitation Act, includes a revision, but it does not follow that a vested right of appeal includes a right to apply in revision. Their Lordships of the Judicial Committee were considering, not the nature of an appeal or an application in revision, but, the effect of the final order passed on an appeal or an application in revision upon the period of limitation for execution of a decree. As regards the question from what date the limitation for execution of a decree should run, their Lordships saw no distinction between an appeal and an application in revision and held that if the limitation is to run from the date of the final order in the appeal, it should also run from the date of the final order on the application in revision. If an application in revision is entertained and disposed of, the effect of the final order passed is exactly the same as if it had been passed on appeal; whatever distinction lies between an appeal and an application in revision is in respect of the matters to be considered before the final order is passed; once the final order is passed, there is no longer any distinction. In *Chidambara Nadar v. Rama Nadar* (2) also, the question was whether the word "appeal" used in Article 182, Limitation Act, includes an application in revision. In *Gurunathhappa v. Dharwar*

(1) A. I. R. 1932 P. C. 165. (2) A. I. R. 1937 Mad. 385

Municipality (1), CHAGLA, J., (as he then was), referred to the right of a suitor in a Court of Small Causes to approach the High Court under section 25 of the Small Cause Courts Act and of his being deprived of that right on account of the suit being tried as a regular suit; the learned Judge did not, however, intend to lay down anything more than that a suitor could apply to the High Court for revision under section 25; he was not considering the nature of the right, if any, to apply, and did not mean to say that he had a right in the sense that he would have a right to file an appeal if the suit was tried as a regular suit. Courts are always open and anybody can approach them and apply for one thing or another; in this sense, it can be said that everybody has a right to make an application. But as pointed out above, a person cannot have a right unless another person has a corresponding duty or liability, and the Small Cause Courts Act does not confer any right to apply for revision under section 25. The suit there was tried as a regular suit and, therefore, the party could not approach the High Court with an application for revision as he could, if it had been tried as a Small Cause Court suit, and this is all that the learned Judge meant to say. In *Sankata Prasad v. Srimati Ram Kushi Devi* (2), it was observed that if an order is passed under the Oudh Rent Act, when it was in force, the course of appeal and also of a revision application will be governed by that Act. I respectfully disagree with the implied rule that a litigant has a vested right to apply for revision.

The revisionary jurisdiction is discretionary; the High Court may revise an order of an inferior court, if it thinks fit to do so and is not required by any law to do so in specified circumstances. The law that confers the power to revise an order does not specify the circumstances in which it must be exercised. It is, therefore, unnecessary to consider the observations of AGRAWALA, J., in *Raghunath v. Mathura Municipality* (3). It would suffice to say that if the law leaves a matter to the discretion of a court, but it requires it to act in a certain

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(1) A. I. R. 1945 Bom. 197. (2) I. L. R. [1947] Luck. 207.

(3) A. I. R. 1952. All. 465, 468.

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manner in certain circumstances, it ceases to be a matter of discretion and becomes a matter of duty when those circumstances exist. Obviously, when a court is required to act in a certain manner in certain circumstances, it ceases to be a matter of discretion.

Under the Amendment Act, the District Judge has acquired the right to revise orders of the Court of Small Causes under his jurisdiction. The Act contains no provision to restrict it only to those orders passed after the Amendment Act came into force. If the District Judge has now the right to revise the order in question, it could not have been intended by the Legislature that the High Court has a concurrent right.

Even if it be said that the applicant acquired on the date, when the suit was instituted against it or on the date when it decreed against it, a right to apply for revision, it cannot be said that it acquired the right to apply to the High Court ; therefore, after the amendment it must apply to the court which has now the power to revise. Its right to apply in revision has been left intact ; only the forum has been changed.

There is no question of the legal proceeding being continued as if the Amendment Act had not been passed ; the suit came to an end when it was decreed by the Court of Small Causes. Its judgment has been made final ; no proceeding can be said to be pending after a final judgment has been passed in it. A final judgment must always terminate the proceeding. A proceeding under section 25 of the Small Cause Courts Act is not a continuation of the proceeding commenced in the Court of Small Causes, and, therefore, is not required by section 6 (e) to be continued in the High Court, as if the Amendment Act had not been passed. If the applicant had no right to apply in revision at all or at least had no right to apply in revision to the High Court, there is no question of its enforcing the remedy by applying in revision, or by applying in revision to the High Court.

Applying in revision cannot be said to be even a privilege within the meaning of section 6. A suitor in a suit tried by a Court of Small Causes has no greater

privilege to apply to the High Court for revision than any person has to approach any court with an application.

By holding that since the enforcement of the Amendment Act only a District Judge has the power to revise an order of a Court of Small Causes, we are not at all giving, what is called, retrospective effect to the Amendment Act. The Amendment Act is in force and we are applying its provisions after its enforcement. An Act is given retrospective effect, when it provides that as at a past date the law shall be taken to have been that which it was not; *vide South Australian Land Mortgage and Agency Co., Ltd. v. the King* (1). Where an Act lays down that if a certain condition is fulfilled a certain act can be done, the question will arise whether the condition is required to be fulfilled after the enforcement of the Act or its fulfilment before its enforcement would do; no such question arises in the case before us. The provision of section 25 is not that if a Court of Small Causes passes a decree or final order, the District Judge may call for the record, etc.; the exercise of the power by the District Judge is not made dependent upon the fulfilment of any condition and any decree or order of a Court of Small Causes can be revised by him now. An enactment providing that in future the liability to repair certain existing pipes shall rest upon certain persons upon whom it did not rest previously is not retrospective; see *George Hudson Ltd. v. The Australian Timber Workers Union* (2). An Act providing that a member alleging irregularity in an election may lodge an application applies to an election completed before the Act came into force; see *King v. Commonwealth Court of Conciliation and Arbitration* (3). A statute laying down that every person convicted of felony shall be disqualified from selling spirits was held in *Queen v. Wine* (4) to apply even though the conviction was obtained before the statute was enacted. Under a certain Act, an accused was liable to enhanced punishment in the case of a second or subsequent conviction and it was

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(1) 30 C. L. R. 623.
(3) 81 C. L. R. 229.

(2) 32 C. L. R. 415.
(4) L. R. [1874-75] 10 Q. B. 195.

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held that previous convictions even though recorded before the Act came into force could be taken into consideration : *in re Frederick Austin* (1). Under a regulation comes into force after the offence in question had been committed, enhanced punishment was provided for the offence and *in re Frank Ephraim Oliver* (2) it was held that the accused was liable to enhanced punishment. Similarly, under the Amendment Act, the District Judge has the power now to revise an order of the Court of Small Causes, even though it was passed before the Amendment Act came into force.

This application for the reasons stated cannot be granted by this Court now and must be rejected. No order about costs.

BEG. J—I agree.

By the Court—We dismiss this application. No orders about costs.

Application dismissed.

APPELLATE CIVIL

*Before the Honourable O. H. Mootham, Chief Justice,
 and Mr. Justice Srivastava*

MUNICIPAL BOARD, HARDWAR (APPELLANT)

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December 7 RAGHUBIR SINGH AND ANOTHER (RESPONDENTS).

United Provinces Municipalities Act, 1916, s. 128 (1), cl. (xiv) —
Hardwar Municipality—Notification imposing toll on vehicles leaving Municipality not ultra vires—Vehicle paying toll while entering—No toll to be levied when going out.

Notification, dated the 29th October, 1941, issued by the Hardwar Municipal Board in exercise of the powers conferred on it by s. 128 (1), cl. (xiv) of the United Provinces Municipalities Act, 1916, imposing a toll on vehicles going out of the limits of the Municipal Board is not *ultra vires* its powers in so far as it purports to invest the Board with that authority.

(1) 8 Cr. Appeal Reports 169. (2) 29 Cr. Appeal Reports. 137.

But a toll shall not be levied on a vehicle, which has paid a toll when last entering the limits of the Municipal Board, on its leaving the limits of the Hardwar Union Municipality.

Special Appeal No. 343 of 1955 from a decision of Mehrotra, J., dated 26th September, 1955, in Civil Misc. Writ No. 326 of 1955.

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The facts appear in the judgment.

Kedar Nath Sinha for the appellant.

R. S. Pathak for the respondents.

The judgment of the court was delivered by—

MOOTHAM, C. J. :—These are appeals by the Hardwar Union Municipal Board from an order of Mr. Justice MEHROTRA, dated the 26th September, 1955, which raise the question of the validity of a tax imposed by the appellant Board on, *inter alia*, motor vehicles leaving the limits of the Hardwar Union Municipality when carrying passengers. The tax (described variously as a toll or tax or toll tax), was first imposed by the appellant Board on the 29th October, 1941, in exercise of the powers conferred on it by section 128 (1), cl. (xiv), of the U. P. Municipalities Act, 1916. The notification imposing the tax, so far as is relevant, reads as follows :

Levy of toll on motor vehicles and tongas entering or leaving the Municipality with passengers

Description of the tax

A toll tax on motor vehicles and tongas entering or leaving the limits of the Hardwar Union Municipality with passengers to be levied at the rate of annas 2 per passenger :

Provided that children over three years of age
• and under twelve shall be charged at half the rates :

Provided also that the tax will not be collected in respect of the following persons :

Then follows a list of nine classes of persons and a Note with regard to the obtaining of exemption certificates to which we refer later. This notification was amended by

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a later notification, dated the 22nd February, 1955. By the amending notification, rickshaws were included among the vehicles on which the tax is levied and the rate of tax was enhanced from two to four annas a passenger. At the same time one of the nine classes of persons in respect of whom the tax would not be collected was omitted.

The principal respondents to these appeals (to whom it is convenient to refer as "the respondents"), are the owners of motor buses which ply between Hardwar and Rishikesh. These vehicles are obliged to stop at a toll barrier just within the limits of the appellant Municipality and are required to pay a toll at the rate of annas 4 per passenger, both when the vehicle enters Hardwar on its journey from Rishikesh and again when it leaves Hardwar on its return journey. The respondents contested the right of the appellant Board to levy a toll by virtue of the notification of the 29th October, 1941, as subsequently amended, and they preferred petitions in this Court under Art. 226 of the Constitution in which they prayed for the issue of writs in the nature of *mandamus* :

- (a) directing the appellant Board and respondent no. 2, (who is the Commissioner of the Meerut-Agra Division), to withdraw the orders contained in the notification, dated the 22nd February, 1955, and to suspend the operation of the orders contained in the notification, dated the 29th October, 1941, to the extent they purported to levy a toll on vehicles entering the limits of the Hardwar Union Municipality when carrying passengers ;

- (b) directing the appellant Board not to levy a toll on the vehicles belonging to the respondents when such vehicles were either entering or leaving the limits of the Hardwar Union Municipality with passengers."

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The learned Judge was of opinion that the appellant Board was entitled to levy a toll on, *inter alia*, motor vehicles entering Municipal limits when carrying passengers but that it had no authority to levy a toll on vehicles leaving Municipal limits. The learned Judge accordingly issued a direction to the appellant Board not to levy toll on the vehicles of the respondents, when leaving the limits of the Hardwar Union Municipality. From that order the appellant Board appeals. There is no appeal by the respondents, and, therefore, the only question, which has to be considered, is the legality of the tax imposed by the appellant Board on vehicles leaving Municipal limits when carrying passengers.

Clauses (vii) and (xiv) of sub-s. (1) of s. 128 of the U. P. Municipalities Act provide that—

" 128. (1) Subject to any general rules or special orders of the State Government in this behalf, the taxes which a board may impose in the whole or any part of a municipality are—

(vii) a toll on vehicles and other conveyances, animals and laden coolies entering the municipality,

(xiv) any other tax which the State Legislature has power to impose in the State, under the Constitution."

Prior to the Constitution coming into force, clause (xiv) of section 128 (1) read thus :

" Any other tax which the Provincial Legislature has power to impose in the Province under the Government of India Act, 1935."

Now the case for the appellant is put in two ways. It is argued, first, that the tax is one on "passengers

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carried by road" within the meaning of Entry 56 in the second list of the Seventh Schedule to the Constitution and is, therefore, one which the Board could impose under clause (xiv) of section 128 (1) of the Municipalities' Act, as it now stands. We think this argument to be without force. In the first place it is to be observed that it is only the additional tax of two annas in respect of each passenger, which was imposed after the Constitution came into force; the original tax amount of was imposed much earlier. Secondly, we are of opinion that the tax is not a tax on passengers at all.

It is argued that the notification does not state in terms by whom the tax is payable, and it is contended that the first proviso and a provision contained in a note at the foot of the notification with regard to the obtaining of exemption certificates indicates that the tax is payable by the individual passengers. We think that this contention is ill-founded. A tax "on" motor vehicles, entering or leaving the Municipal limits, implies, in our opinion, that the tax is payable by the person who brings that vehicle in or takes it out of those limits, and that that was the intention of the Board is in our opinion made clear by rules 1 and 2 of the Rules for the assessment and collection of the tax published in a notification, also dated the 29th October, 1941. Those rules read thus :

" 1. No person shall bring within or carry outside the limits of the municipality any motor vehicles or tongas laden with passengers unless he has paid the tax in respect of the passengers, nor shall any person, in order to evade payment of the toll tax, let down passengers, outside the municipal limits and pick them up again at any place within the limits after passing the barrier.

2. When any person in charge of a motor car or lorry or tonga laden with passengers wishes to pass a barrier, such persons shall pay the toll to the moharrir or any person

appointed by the Board for the purpose, at the barrier. On receipt of the tax the person receiving it shall fill up a receipt in duplicate and shall hand over one copy along with coupon to the person paying the toll and retain the other as a counter-foil in the receipt book."

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In our opinion the two notifications of the 29th October, 1941, when read together—as they must be read—make it clear that the liability to pay the tax is imposed on the person in charge of the vehicle, the amount of the tax being calculated with reference to the number of passengers. The first proviso to the first notification does suggest that the tax is levied on the passengers, but when that proviso is read in conjunction with the second proviso we have no doubt that it means that tax will be collected at half rates "in respect of" children between ages of 3 and 12 years. The fact that exemption certificates can be obtained by persons who come within one of the classes enumerated in the second proviso in our opinion means only that in respect of such persons tax will not be collected from the person in charge of the motor vehicle in which they are passengers.

The second argument is that as the tax to the extent of two annas in respect of each passenger was first imposed in the year 1941, it was tax which, if not falling within clause (vii) of section 128 (1), was a tax which the Provincial Legislature had power to impose, and which continued to be lawfully levied after the Constitution came into force by virtue of Article 277; and that the additional tax of two annas in respect of each passenger, levied in the year 1955, was a tax which [if not falling within clause (vii)], the State Government had power to impose, and that, therefore, in both these the tax could be validly levied by the appellant Board under clause (xiv).

The taxes which a Provincial Government in 1941 the State Government after the 26th January, 1950, power to impose are to be found in List II of the

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Seventh Schedule to the Government of India Act, 1935, and in List II of the Seventh Schedule to the Constitution respectively. It is conceded on behalf of the appellant Board that if the impugned tax is not a tax which could be imposed by the Board under clause (vii) of section 128 (1), then it is valid to the extent of the first two annas only if it be a tax which is a "toll" within the meaning of Entry 53 of List II of the Seventh Schedule to the Act of 1935, and, as regards the second two annas, is either (a) a tax on "passengers carried by road" within the meaning of Entry 56 or a "toll" within the meaning of Entry 59 of List II of the Seventh Schedule to the Constitution. It is further conceded that if a toll has been paid under clause (vii) on a vehicle entering municipal limits, then the appellant Board could not, under that clause, impose a toll on the same vehicle when leaving municipal limits. We have held that the tax is on passengers carried by road and the only question, therefore, is whether the tax imposed by the appellant Board on motor vehicle leaving municipal limits with passengers is a "toll" within the meaning of either Entry 53 of List II of the Seventh Schedule to the Government of India Act, or Entry 59 of List II of the Seventh Schedule to the Constitution. It is not suggested that the word "toll" has not the same meaning in both entries.

Now it is not seriously disputed that a toll is a payment which is taken in respect of some benefit, common examples being a toll paid for the right to use a market or to cross a bridge. It is not, however, in our opinion, essential that the toll should be collected at the moment the benefit for which it is paid arises. It is not necessary that it be realized, in the case of the examples we have given, at the moment when the trader enters the market place or when the traveller starts to cross the bridge. We can see no reason why it cannot be realized when the trader leaves the market or the passenger has reached the other end of the bridge. It cannot, however, be collected twice in respect of the same benefit. If the consideration for the payment

the toll is the use of the market area, or the right to cross the bridge, the toll cannot be levied both when the trader enters and when he leaves the market or when the passenger starts crossing the bridge and again when he has crossed it.

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Now in the case before us it is not in dispute that the consideration for the payment of the toll levied by the appellant Board is the right to use the roads within the municipal limits and such amenities as may be connected therewith. The toll as payable by certain classes of vehicles, including motor vehicles, when carrying passengers, and in our opinion it is immaterial whether the toll be collected when the vehicle enters the municipal limits or when it leaves them. But when once the toll has been paid, it cannot again be levied on the same vehicle in respect of the same user of the appellant Board's roads and amenities. We are of opinion, therefore, that the respondents are right in their contention that if they have paid the toll on their vehicles when entering Hardwar municipal limits, they cannot be compelled to pay that toll again when the same vehicles leave the municipal limits on their return journey.

We think, therefore, with respect, that the learned Judge, went too far when he said that a toll cannot be levied on a vehicle going out of the limits of the Municipal Board, and that as a consequence the appellant Board's notification of 1941, was *ultra vires* its powers in so far as it purported to invest the appellant Board with that authority. The respondents are, however, entitled to a direction that the appellant Board shall not levy a toll on vehicles owned by them when leaving the limits of the Hardwar Union Municipality, in those cases in which the same vehicles have paid a toll when they last entered those limits. Subject to this modification of the order made by the learned Judge, these appeals fail, and they are dismissed. In each appeal the first respondent is entitled to his costs recoverable from the appellant Board.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bhargava and Mr. Justice Chaturvedi

KARAN SINGH (APPELLANT)

v.

JAMUNA SINGH (RESPONDENT)

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Representation of People Act, 1951, s. 123 (3) —“Symbol” meaning of—Portrait of Mahatma Gandhi—National symbol—Corrupt practice.

The word “symbol” used in s. 123 (3) of the Representation of People Act, 1951, can appropriately be applied to such as would represent something national by some natural fitness and it should also be an emblem.

The portrait of Mahatma Gandhi is not a national symbol within the meaning of the expression “symbol” used in s. 123 (3) of the Representation of People Act, 1951, and its use by a candidate at election does not constitute a corrupt practice.

First Appeal No. 24 of 1958, from an order of R. S. Bhargava, District Judge, Budaun, dated the 6th December, 1957, in Election Petition No. 55 of 1957.

The facts appear in the judgment.

S. C. Khare and Kamal Narain Singh for the appellant.

Jagdish Swaroop for the respondent.

The judgment of the Court was delivered by—

BHARGAVA, J. :—The polling for the election of a member to the U. P. Legislative Assembly from Gunnaur Constituency in district Budaun in the last general election took place on the 28th of February, 1957. The counting took place on the 2nd of March, 1957, and, on the same date, the result was declared. Jamuna Singh respondent, whose candidature was sponsored by the Praja Socialist Party, received 14,361 votes and was declared elected. Karan Singh appellant received the next highest number of votes. He was a candidate on behalf of the Congress and he received 11,007 votes. A third candidate, Kamal Prasad, was an independent candidate and he received 7,227 votes. Karan Singh then

presented an election petition to the Election Commission on the 15th of April, 1957, which was referred for trial to the Election Tribunal, Budaun. The Tribunal dismissed this petition with costs on the 6th of December, 1957, and the present appeal has been filed against that dismissal of the petition.

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In the election petition presented by the appellant, a number of grounds were put forward for the prayer that the election of the respondent be declared void. On the basis of these grounds and in view of other points arising, the Tribunal framed 19 issues. It is not at all necessary to mention all those issues because, when learned counsel for the appellant advanced his argument in this appeal, he made a statement that he would confine his arguments to only a few issues, viz. Issues nos. 1, 2, 8, 9, 10 (a) to 10 (b) and 13. He gave up the case of the appellant on the remaining issues so that we need not deal with them at all.

Issue no. 1, was framed on the basis of the allegation that the corrupt practice of bribery was committed by the respondent on the 6th of January, 1957, at Babrala by making an offer or promise to Sri Komal Prasad, a partner in his firm, by relinquishment in his firm, by relinquishing the profit of his share, with the object of inducing him to stand at the election, as the respondent knew that he could not succeed in a direct contest and, for this reason, Komal Prasad fought the election. The issue was—

“Whether Komal Prasad was made to stand in the election as a candidate because of the offer or promise of the respondent to forego his share of profits in the partnership business. If so, its effect.”

The respondent, of course, denied that he had made any offer or promise to Komal Prasad in order to induce him to stand as a candidate at this election. The fact that Komal Prasad and the respondent are partners of a firm is admitted, as also the fact that both of them are candidates from the same constituency in addition to the appellant, who was the third candidate. It is also

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admitted on behalf of the respondent that he and Komal Prasad were on good terms before the election and continued to be on good terms even after the election. The burden, however, lay on the appellant to establish that Komal Prasad had been induced to stand as a candidate by the offer of a bribe by respondent. To establish this allegation the appellant examined five witnesses. He could produce no documentary evidence at all. The first witness is Piarey Lal, who was admittedly a polling agent of Komal Prasad. Piarey Lal states that Komal Prasad was earlier a Congress worker. According to him, he went to the house of Komal Prasad on the 6th of January, 1957, and, when he arrived, he found the respondent there. The respondent, in his presence, asked Komal Prasad to stand as a candidate in the election because he was afraid that, if he was the sole candidate against the Congress, he would not succeed. Komal Prasad said that he had no money. The respondent then said that he would give to Komal Prasad his share of profits in the partnership business. Piarey Lal's further statement is that, at the time of this talk, other persons present were Khannoo, Chokhey, Moti Ram and Rajendra. Komal Prasad, according to him, agreed to stand as a candidate due to the offer made by respondent. This story given by him, in his evidence, is the one which has been relied upon by the appellant. In judging the evidence, the first circumstance that appears to us to be of great importance, is that this story itself is highly improbable. Firstly, there is nothing to indicate that, if Komal Prasad did stand as a candidate, it would, in any way, have enhanced the prospects of the success of the respondent. When this appeal was argued before us, the argument put forward by learned counsel for the appellant was that this was a constituency from which, almost always in the past, candidates belonging to the Yadava community had been elected to the Legislature and the purpose of the respondent in asking Komal Prasad could draw to himself the votes of persons who did not belong to the Yadava community and who might have supported the appellants as he was Congre

candidate. We have not been able to find anything in the evidence to show that the fact that Komal Prasad was going to stand as a candidate could have affected the votes of persons, who did not belong to Yadava community. In fact, there is no evidence worth the name on this point. What has been sought to be proved in evidence is that the object of Komal Prasad in standing as a candidate was that there should be a division of votes of those voters who were likely to support the Congress candidate. It was suggested that Komal Prasad resigned from the Congress and then stood as a candidate with this object. Komal Prasad does admit that he resigned from the Congress but, according to him, his intention to stand arose long before the 6th of January, 1957. He had been intending to stand as a candidate for a long time. The reason why he could hope for success when standing as an independent candidate emerges from the evidence of the witness examined on behalf of the appellant himself. Moti Ram, one of the witnesses examined on behalf of the appellant, admits that Komal Prasad had been helping flood victims year after year by feeding them and by giving them clothes. Similar admission was made by other witnesses also. It seems that having done this public service, Komal Prasad may have thought that he would stand a good chance of being elected, particularly when the Yadava community votes might have got divided between his two rival candidates, the appellant and the respondent, who both belonged to the Yadava community. Consequently, the reason for the candidature of Komal Prasad appears much more likely to be that he expected to be successful, rather than that he stood as a candidate merely to take away votes from the appellant. The next point is that Komal Prasad and the respondent were partners and were on good terms and must have been meeting very frequently. There appears to be no reason at all why, in such circumstances, even if the respondent wanted to persuade Komal Prasad to stand as a candidate, he should have acted so negligently as to make the offer at a place where a number of other persons were

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present. Such an offer could easily have been made on any occasion when Komal Prasad and the respondent were together with no other persons present. It is also significant that the witnesses, who claim to be present, are not persons very intimately connected either with the respondent or with Komal Prasad. Piarey Lal no doubt claimed that he knew Komal Prasad and had occasion to visit him. In his cross-examination, however, he was unable to explain why he went to Komal Prasad and he had to admit that his previous contact with Komal Prasad was nominal. Similarly, the other witnesses, Moti Ram and Chokhey, are also not persons who are particularly close friends of the respondent or Komal Prasad. If the respondent had really intended to make an offer of bribe to Komal Prasad, it would be expected that he would not make such an offer even in the presence of his intimate friends. The allegation that he made such an offer in the presence of persons, who were practically strangers to him, appears to be absurd and unbelievable. Piarey Lal was questioned as to how he remembered the date of this offer and his answers again show the unreliability of his evidence. He says that his brother, Bhup Singh, was also present and Bhup Singh mentioned to him that the date was 6th January, 1957, as Bhup Singh had a case of his in court on that date. It is significant that the other two witnesses Moti Ram and Chokhey made no mention of the presence of Bhup Singh and even Piarey Lal introduced the presence of Bhup Singh when he was cross-examined as to how he remembered the date of this offer. If, as suggested by Piarey Lal, it is true that Bhup Singh had a case in court on that date, it is much more likely that Bhup Singh would have been in court rather than at the house of Komal Prasad to overhear this offer of a bribe. Thus the evidence given by Piarey Lal is of a very unsatisfactory and unreliable character. Similar is the evidence of the other two witnesses, Moti Ram and Chokhey. There are certain other discrepancies also which indicate the unreliability of these witnesses. For example, the exact language of the offer, which the respondent is said

to have made to Komal Prasad, given by Piarey Lal is different from the language given by Moti Ram. Then, according to Piarey Lal, of all the witnesses who were present, he was the last to arrive. Moti Ram, on the other hand, claims that he was himself the last to arrive and that Piarey Lal had come before him. In the case of Moti Ram, there is the further significant point that he does not say that the respondent authorized Komal Prasad to utilize his share of profits in the partnership business. His version is that all that the respondent said was that Komal Prasad could spend out of the partnership funds. This would not be an offer of a bribe at all. Spending from the partnership funds could only mean that Komal Prasad could take a necessary loan, which he would have to refund to the partnership. It does not mean that he was authorized to use up money of the share of the respondent in the assets of the partnership and never to refund that amount later. Chokhey Singh similarly claims that he arrived before Piarey Lal, but after Moti Ram, which is in contradiction with the evidence of Piarey Lal. The version of Chokhey Singh as to how he happened to be present is very unlikely. According to him, he had come from duty to take his food and, when he was returning, he happened to arrive and joined the group. He is clearly a chance witness. It is very unlikely that, in the presence of such a chance witness, the type of talk alleged by the appellant could have been carried on by the respondent with Komal Prasad. Another witness relied upon is Om Prakash, who had tried to prove an admission by the respondent that he had persuaded Komal Prasad to stand as a candidate in the election. His evidence is also of a very unreliable character. According to him, he came to Babrala on his way to Gunnaur where he was going to work as a polling agent and he accidentally met the respondent. It appears to be a strange coincidence that the respondent, who lives seven miles away from Babrala, and this witness, who lives in Budaun, should have come to Babrala at the same time and met by chance so as

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to enable the respondent to make this admission to the witness. Further, even the admission alleged by this witness is merely to the effect that Jamuna Singh had made Komal Singh stand as a candidate without any mention that he had offered any bribe to Komal Prasad for the purpose. The last witness relied upon is Karan ; he has no personal knowledge of this alleged offer. According to him, he received information from Rajendra Singh. When Rajendra Singh was his principal informant, his failure to produce Rajendra Singh as a witness is itself important and no explanation for it is offered by him. On the other hand, Jamuna Singh respondent himself and Komal Prasad have both appeared as witnesses on behalf of the respondent and have denied on oath that any such talk took place between them. Komal Prasad has further stated that he made up his mind to stand as a candidate long before the 6th of January, 1957, and this evidence of Komal Prasad is corroborated by Raghubir Singh who says that Komal Prasad had told him six months earlier that he was going to stand as a candidate. His evidence also shows that Komal Prasad is a well-to-do man and was, therefore, not likely to accept an offer of a bribe to stand as a candidate. The fact that Komal Prasad is a well-to-do man also appears from the admissions made by witnesses Moti Ram and Chokhey, who were examined on behalf of the appellant. The making of an offer of bribe and its acceptance for this reason becomes still more unlikely. Another witness, Mahabir Shingh has been examined on behalf of the respondent, who has stated that Komal Prasad actually started canvassing in the month of *Kartik* which would be long before the 6th of January, 1957. In view of this state of evidence, we consider that the learned Judge of the Election Tribunal arrived at the correct finding that the appellant had failed to prove that any offer of a bribe was made to Komal Prasad to stand as a candidate or that any such offer was accepted by Komal Prasad.

The next issue, which we have to deal with, is Issue no. 7, which is as follows :

"Whether the respondent, his agents, supporters, and workers, with the consent and connivance of the respondent exhibited the photo of Mahatma Gandhi to further the prospects of the respondent's election? If so, its effect."

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The allegation in the election petition was that the respondent had made a systematic appeal to a national symbol by exhibiting the photo of Mahatma Gandhi, Father of the Nation, through pamphlets used in the election, having these words written "*Congress Tor Do*". It was alleged that these pamphlets were used for the furtherance of the prospects of the respondent's election and such pamphlets were used throughout the days of election in the said constituency. It appears that the paper, which has been used, has been wrongly described in the election petition as pamphlet. It is in fact a poster. On the poster appears a portrait of Mahatma Gandhi and not a photograph. At the top of the poster is the sentence "*Congress Tor Do*" with the name of Mahatma Gandhi under it in brackets, indicating that this sentence represented Mahatma Gandhi's views. In this portrait of Mahatma Gandhi, his left hand is shown as raised with the palm outwards. The posture in the portrait thus indicates that he was making some exhortation. Then there are figures of four persons who were walking towards a box which has on it a diagram of a hut. One of the four persons is casting a ballot-paper in that box. At the bottom is an appeal to vote for the Praja Socialist Party. It is alleged on behalf of the appellant that such posters were pasted at various places in this constituency and that this was done with the consent of the respondent.

The Election Tribunal has believed the evidence given on behalf of the appellant to show that such posters were used in the election with the consent of the respondent. Sabir Husain has been examined on behalf of the appellant to prove that these posters

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were printed at the Press at Lucknow, of which he is the Manager, on the basis of an order placed by one Balram Singh, brother of Triloki Singh, who is an office-bearer of the Praja Socialist Party. There is no disbelieving the evidence of this witness. The appellant has, of course, failed to prove that after these posters were printed at the instance of Triloki Singh, they were also supplied to the respondent for use by him in his election campaign, but, in our opinion, there is very good evidence to show that such posters were actually utilized. The main witness, who has been relied upon by the Election Tribunal, is G. L. Singh, Sub-Inspector of Police in charge of a police station, who stated that he saw the posters with an *aalha* party which was sponsored by the respondent. Nothing could be elicited in the cross-examination to show that this Sub-Inspector was an interested witness and could not be relied upon. Then the appellant has produced five witnesses to prove that these posters were pasted at various places by persons under the directions of or with the consent of the respondent. These witnesses are Chhabi Krishna, Parmatma Sarup, Din Bandhu, Shishpal Singh and Shanti Sarup. It has been urged by learned counsel for the respondent that the evidence of these witnesses is unreliable and, in judging their credibility, we should take into account not only the evidence which they have given on this issue, but also the evidence given by them on another issue with which we shall deal later. We are inclined to agree with learned counsel for the respondent that the evidence of these witnesses at least on other issues is very unreliable and cannot be acted upon, but that by itself cannot be sufficient for rejecting their evidence on this issue. Their evidence on this issue should, of course, be accepted with great caution. Chhabi Krishna, Parmatma Sarup and Din Dayal Bandhu witnesses have given evidence to prove the pasting of posters in village Bhiraoti where, according to them, Jamuna Singh came and left instructions for these posters being pasted. Parmatma Sarup was admittedly a polling agent of the respondent and his evidence is that h

himself pasted these posters under the instructions of the respondent, who gave the posters to him. Chhabi Krishna states that the posters were pasted on behalf of the respondent. Din Bandhu was also a polling agent of the respondent and he also states that he pasted these posters under the instructions of Jamuna Singh, who had given him these posters seven or eight days before the date of polling. It does appear to be suspicious that these persons, who claim to have been the supporters of the respondent, should now give evidence against the respondent. There must be some reason why, having once worked for the respondent, they should now try to undo the result of that work by getting his election declared void. At the same time, there is the circumstance that there is very good corroborative evidence which we have indicated above. The appellant has succeeded in proving that such posters were printed at the instance of the Praja Socialist Party and that such posters were in fact pasted at places within the constituency from which the respondent had been elected. If this good evidence had not been available, we would not have been inclined to rely on the evidence of Chhabi Krishna, Parmatma Sarup and Din Bandhu, but in view of the corroboration provided by such good evidence, we consider that on this point, there is no sufficient reason to discard the evidence of these three witnesses, particularly when the learned Judge of the Tribunal, who had the benefit of watching the demeanour of these witnesses in the witness-box, was of the opinion that their evidence should be accepted. The evidence of Shishpal Singh is even more unreliable on that other issue than the evidence of the three witnesses, Chhabi Krishna, Parmatma Sarup and Din Bandhu, but, in his case also we consider that in view of the corroboration provided by independent evidence, there is no justification for disbelieving him on this point. The same remarks apply to the evidence of Shanti Sarup. Considering the nature of the evidence as a whole, we are inclined to the view that, in this case, there is no sufficient material on the basis of which we can justifiably differ

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from the view taken by the Election Tribunal and set aside his conclusion that the use of these posters with the consent of the respondent has been established by the evidence given on behalf of the appellant.

The question, however, is whether the use of these posters constitutes the corrupt practice or the use of or appeal to the national symbol for the furtherance of the candidature of the respondent. As held by the Election Tribunal, the use of these posters was certainly likely to assist the candidature of the respondent. There can be no doubt that, in these elections, voters were likely to be very considerably influenced by whatever may have purported to come from Mahatma Gandhi, the Father of the Nation. The poster indicated that one of the opinions of Mahatma Gandhi was that the Congress should be disbanded. It may be that this view was expressed under special circumstances and at a time which may not be comparable with the time when these elections were held. There is, however, the fact that the view expressed by Mahatma Gandhi was put forward before the voters at the time of election and it was very likely that the voters might have been influenced because they were led to believe that Mahatma Gandhi did not want the Congress to continue as such any longer. Further, the posture of Mahatma Gandhi in the portrait also indicates as if he was exhorting people to support the candidate of the Praja Socialist Party. The fact that the hand, which is shown as raised, is the left hand and not the right hand would indicate that, by the portrait the impression that was sought to be given was only that Mahatma Gandhi was making exhortation and not that he was giving a blessing. If the portrait had been intended to convey the giving of a blessing, the right hand would have been raised. However, the posture in the portrait indicating exhortation to support the Praja Socialist Party was also likely to influence the voters to support the candidate of that party. In these circumstances, the only question that remains to be examined is whether this poster or the portrait of Mahatma Gandhi on it is a national symbol. If we hold it to be a national

symbol had been used for the furtherance of the candidature of the respondent.

We must confess that in dealing with the question as to whether the portrait of Mahatma Gandhi is a national symbol or not, we have experienced a certain amount of difficulty because the word "symbol" is nowhere defined in law and we have to depend on the meaning given to the word "symbol" in the dictionaries, which would appropriately fit in the context in which the word has been used in section 123 (3) of the Representation of the People Act (hereinafter referred to as the Act). In Murray's New English Dictionary, 1919 Edition (Oxford), various meanings of the word "symbol" are given. We found by reference to other dictionaries available to us that this dictionary contains the most exhaustive collection of the meanings of this word and, consequently, we are referring to it. The first meaning given is—

"A formal authoritative statement or summary of the religious belief of the Christian church or of a particular church or sect; a creed or confession of faith."

The second is—

"A brief of sententious statement; a formula, motto, maxim, occasionally a summary, synopsis."

These meanings cannot be applied to the word "symbol" as used in section 123 (3) of the Act. The third meaning, which appears to be the one that can be applied, is something that "stands for, represents, or denotes something else (not by exact resemblance, but by vague suggestion, or by some accidental or conventional relation) especially a material object representing or taken to represent something immaterial or abstract, as a being, idea, quality or condition; a representative or typical figure, sign or token".

The remaining meanings, which do not apply, are—

"An object representing something sacred. A small device on a coin, additional to and

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usually independent of the main device or type. A written character or mark used to represent something, a letter, figure or sign conventionally standing for some object, process, etc."

Learned counsel for the respondent referred us to a book entitled "Funk and Wagnall's Standard Handbook of Synonyms, Antonyms and Prepositions", 1947 Edition, by James C. Fernald, L.H.D. In that book, the principal word dealt with is "emblem" and the word "symbol" is given as one of the synonyms. In order to distinguish between the two, the following explanation is given :

"Emblem is the English form of *emblem*, a Latin word of Greek origin, signifying a figure beaten out on a metallic vessel by blows from within, also, a figure inlaid in wood, stone, or other material as a copy of some natural object. The Greek word *Symbulon* denoted a victor's wreath, a check ; or any object that might be compared with, or found to correspond with another, whether there was or was not anything in the objects compared to suggest the comparison. Thus an *emblem* resembles, a *symbol* represents.

An emblem has some natural fitness to suggest that for which it stands ; a *symbol* has been chosen or agreed upon to suggest something else, with or without natural fitness."

This explanation of the distinction between the words "emblem" and "symbol" would indicate that an emblem will always be a symbol. In the case of a symbol, it may represent or suggest something else with or without natural fitness. If . . . it suggests some natural fitness, it may be an emblem. That is why in the book referred to above it has also been said that "a *symbol* may be also an *emblem* ; thus the elements of bread and wine in the Lord's Supper are both appropriate *emblems* and his own chosen *symbols* of suffering and death."

Then there is given an example where something is a symbol and not an emblem. It is said ; "A statement of doctrine is often called a *symbol* of faith ; but it is not an *emblem*".

Normally, a photograph or a portrait only represents the person of whom it is a photograph or a portrait. A photograph or portrait may, therefore, within the meaning applicable in some cases, though not always, be a symbol of the person whose photograph or portrait it is. It appears to us that, in considering the main question whether the portrait of Mahatma Gandhi is a national symbol or not, the meaning of the word "symbol", which can appropriately be applied, is only that under which it must appear that this portrait represents something national by some natural fitness, and then it would also be an emblem. If there is no fitness at all between what the portrait actually is and what it represents, it would be very difficult to hold that it is a national symbol. It was in the light of this meaning of the word "symbol" that we questioned learned counsel for the appellant and tried to elicit from him what this portrait of Mahatma Gandhi could represent. The only suggestion that could be put forward before us was that this portrait represented the Indian Nation, and, consequently it was a national symbol. It was not suggested that the portrait should be treated as a national symbol because it represents Mahatma Gandhi himself. Something, which represented Mahatma Gandhi himself, could not be contended to be a national symbol by learned counsel for the appellant, because it cannot be said that by merely representing Mahatma Gandhi a symbol would become a national symbol. But the argument that it represented the Indian Nation cannot also be accepted. We have failed to understand how it can be held that a portrait of Mahatma Gandhi at all represents the Indian Nation. That portrait is not typical of the Indian Nation and, if any portrait of Mahatma Gandhi were ever to be recognized as representing the Indian Nation, it would be a particular portrait and not all his portraits. It cannot be held that every single portrait of Mahatma Gandhi, whatever his

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posture in it, would represent the Indian Nation. In this connexion, it is important to note that the Act itself gives an example of one of the national symbols about which full details are known. That symbol is the national flag. The national flag is recognized as national symbol and, wherever it is flown, it connotes the idea of the presence or representation of the Indian Nation. This is a principle well recognized in international relations. The national flag is thus a national symbol because, wherever it exists, it at once gives an idea that, in some form or the other, the Indian Nation is also present or represented there. The same cannot be said with regard to a portrait of Mahatma Gandhi. People may keep his portrait because they revere him or have a great regard for him and treated him as the Father of the Nation who brought alone independence of this country. By keeping his portrait, however, it cannot be said that there is any intention to signify that the Indian Nation as such is present or represented where that portrait happens to be. It appears to us, therefore, that it is not possible to hold that a portrait of Mahatma Gandhi is a national symbol in the sense that it represents the Indian Nation, which was the only suggestion which could be put forward before us during the course of arguments when this point was considered by us.

There is also another significant aspect which needs to be examined. The question is as to how a symbol becomes a national symbol. Learned counsel for the parties, when called upon to address us on this point, could only draw our attention to the proceedings of the Constituent Assembly which, by a resolution, dated the 22nd of July, 1949, adopted the national flag. The national flag became a national symbol by a resolution of the Constituent Assembly which had the supreme power to lay down the Constitution of India. Apart from this means, no other means has been brought to our notice. We could envisage four other possibilities by which a symbol may become a national symbol. They are (1) by law passed by the Parliament, (2) a declaration by the Government of India either under the powers granted by law or in exercise of their executive powers, (3) b

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international recognition, and (4) by recognition by the nation as a whole, the recognition being either express or implied. No law of the Parliament has been brought to our notice under which any symbol has been given to the Government of India to declare a symbol as a national symbol. The only law, which was brought to our notice, was the Emblems and Names (Prevention of Improper Use) Act, 1950 (Act XII of 1950). That Act does define the word "emblem" and also lays down what the various emblems are. One of the emblems is the Indian National Flag. It, however, appears that there is no provision in that Act declaring any emblem as a national emblem and the word "national" is used only when referring to the Indian National Flag and not when referring to other emblems. It is also to be noticed that, in the schedule to that Act, as originally passed by the Parliament, not only the Indian National Flag and the official seal or emblem of Government of India or any other insignia or coat-of-arms used by Government of India, were included in the word "emblem", but there were also included in the word "emblem", an official seal or emblem of any State or any other insignia or coat-of-arms used by any such State or by any department of any such State. In addition, the name, emblem or official seal of the World Health Organization were also included in the word "emblem" and so were the name, emblem or official seal of the United Nations Organization. Clearly, all these emblems cannot be held to be national emblems of India. The emblem or the official seal of the United Nations Organization can never be held to be a national symbol or national emblem of a particular country. In these circumstances, we consider that no assistance can be taken in interpreting the words "symbol" and "emblem", used in the Act, by referring to the Emblems and Names (Prevention of Improper Use) Act, 1950.

* The next question is whether a symbol can become a national symbol when a declaration is made by the Central Government in exercise of its executive powers. It is very difficult to accept the contention that a symbol can become a national symbol by a mere declaration by

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a government but it seems to us that we need not answer this point in the present case because there is no suggestion at all that any such declaration was ever issued. Very similar is the question whether a symbol can become a national symbol by international recognition or by express recognition by the nation as a whole, because there is no suggestion that in the case of portrait of Mahatma Gandhi there has been any international recognition or any express recognition by the Indian Nation that this portrait is to be a national symbol. Reliance, in these circumstances, was placed only on the possibility that a symbol may become a national symbol if it is impliedly recognized as such by the nation. It seems to us that there are two reasons why this argument should not be accepted. The first is that there is no evidence at all and there is no reason to raise a presumption that the portrait of Mahatma Gandhi is impliedly accepted as a national symbol by the Indian Nation as a whole. It is true, as mentioned by an Election Tribunal in the case of *Desai Basawaraj v. Dasan-op Hasansab* (1) that the birthday of Mahatma Gandhi is observed as a national holiday or a public holiday under the Negotiable Instruments Act and the picture of Mahatma Gandhi is hung in all the Government offices at Government cost, but we do not think that these acts can convert the portrait of Mahatma Gandhi into a national symbol. The reason why the birthday of Mahatma Gandhi is observed as a public holiday under the Negotiable Instruments Act is clear. It is Mahatma Gandhi who is accepted as the founder of the independence of this country and, consequently, his memory is commemorated by celebration of his birthday. This fact, however, does not mean that his portrait has been recognized impliedly as a national symbol. So far as the fact that his portrait is hung in all Government offices at Government cost is concerned, clearly this is done under the instructions issued by the Government in exercise of its administrative powers. The fact that the Government, which has the right of regulating what is to be done in its offices, issues a direction that the portrait of Mahatma Gandhi should be

(1) 4 E.L.R. 380.

ning in all public offices can also not convert that portrait into a national symbol and cannot be held to be evidence of the fact that the portrait is recognized as a national symbol by the nation as a whole. Such administrative orders issued at the discretion of a government can be varied from time to time. Under the Constitution, the government is carried on in accordance with the policy of the majority party in the Parliament. It would, therefore, depend on the views of the majority party whether the portrait of Mahatma Gandhi should continue to be hung in Government offices or not. At best, therefore, the fact that the portrait is hung in Government offices at present indicates that the present party Government attaches some sanctity or value to the portrait of Mahatma Gandhi and desires that it should be hung in every Government office. May be that this practice may always be continued because it was through the guidance of Mahatma Gandhi that India achieved independence. These circumstances cannot, in our opinion, however, lead to an inference that the Indian Nation as a whole has accepted or recognized that Mahatma Gandhi's portrait is a national symbol.

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It also appears to us that in the case of the provision made in section 123 (3) of the Act, some significance must be attached to the use of the words "such as" after the words "national symbol's" and before the words "the national flag" and "the national emblem"; very frequently if the meaning of a particular word is sought to be enlarged after using that word, the Legislature uses the word "including" and then mentions the persons or objects which are to be included within the meaning of the first word. In the present case, the Legislature did not use the word "including" but instead used the expression "such as". There is then the circumstance that another expression, which is very frequently used, is "for example". If the expression "for example" was used in the present case, the inference would be that the expression "national symbol" is not to be interpreted with reference to the words "national flag" and "national

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emblem"; national flag and national emblem would then only be examples of national symbols and other national symbols may be quite different from these two symbols. The use of the expression "such as" instead of "including" or "for example"; in our opinion, connotes an idea that only those national symbols should be taken into account which are like and similar to the national flag or the national emblem. In order to be like or similar to the national flag or the national emblem, a national symbol must possess the same characteristics which are possessed by the national flag or a national emblem and, therefore, must become a national symbol by a process similar to that by which the national flag became a national symbol. The national flag, as we have already indicated above, acquired its characteristic of being a national symbol by a resolution of the Constituent Assembly. So far, we have discovered no provision of any law or any resolution by a competent body declaring any emblem to be a national emblem. In the circumstances, it appears to us that the portrait of Mahatma Gandhi could have been recognized a national symbol if it had been declared as such by a resolution of the Constituent Assembly in the same manner in which the national flag was declared to be a national symbol. The only other example where there is recognition of a national character, that we are aware of, is in the case of the national anthem. The national anthem was also recognized by a resolution of the Constituent Assembly. In this country, therefore, so far the character of being national has been acquired only by the national flag and the national anthem and that was by resolutions of the Constituent Assembly. The portrait of Mahatma Gandhi has nowhere received such recognition. In all these circumstances, we are led to the conclusion that the portrait of Mahatma Gandhi cannot be held to be a national symbol within the meaning of that expression used in section 123 (3) of the Act. The portrait of Mahatma Gandhi not being a national symbol, its use by the respondent did not constitute a corrupt practice and the Election Tribunal was,

therefore, right in holding that the election of the respondent was not liable to be set aside on this ground.

[The judgment then deals with various instances of corrupt practices.]

The result of the finding recorded by us above is that the appellant has failed to prove his case in respect of any of the grounds which would justify the declaration of the election of the respondent as void. The appeal fails and is dismissed with costs for the calculation of which we fix the fee of counsel for the respondent at Rs.400.

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Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Chaturvedi and Mr. Justice Roy

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Representation of the People Act, 1951, s. 7 (d), contract taken by firm from Government—All partners disqualified—Words “for the benefit”, meaning of—Pleading—Averment that candidate has a share or interest, sufficiency of—U. P. Sales Tax Act, 1948, s. 23 (1)—Return of Sales Tax, admissibility of—Indian Evidence Act, 1872, ss. 11, 35, 74—Statement of description of witness, if admissible.

Where one partner of a firm takes a contract on behalf of the firm he takes it for the benefit of all the partners, and all the partners of the firm are disqualified under s. 7 (d) of the Representation of the People Act, 1951, for being chosen as a member of the U. P. Legislative Assembly if the contract is for the supply of goods to the appropriate Government.

The words “for his benefit” do not mean that the share or interest must be for the exclusive benefit of a candidate. If the candidate has a share or interest in the contract and is likely to be benefited along with the other partners in the firm, his case also falls within the ambit of s. 7 (d) of the Act.

An averment in the pleading that a candidate has a share as well as interest in a contract for the supply of goods to the U. P. Government taken along with the allegation that the family of the candidate carries on the business as jointly under

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a firm name is sufficient for making out a pleading for the charge under s. 7 (d) of the Representation of the People Act, 1951.

The return of sales-tax filed by an assessee under the U. P. Sales Tax Act, is a public document within the meaning of s. 74 of the Indian Evidence Act and apart from s. 35 of the Indian Evidence Act, it is also admissible under s. 11 of the Evidence Act as it makes the existence of a fact in issue highly probable.

A statement as regards the description of a witness made before a Sales Tax Officer purporting to be a statement made by the witness himself is admissible in evidence even though the admission made therein was not on oath and had been made before the oath was administered.

First Appeal No. 21 of 1958, from a decision of R. C. Dube, District and Sessions Judge, Member, Election Tribunal, Bijnor, dated the 26th December, 1957, in Election Petition No. 164 of 1957.

The facts appear in the judgment.

Jagdish Swaroop—for the appellant.

Shanti Bhushan—for the respondent.

The judgment of the Court was delivered by—

CHATURVEDI, J. :—This is an appeal under section 116-A of the Representation of the People Act, as amended by Act no. XXVII of 1956, (hereinafter called the Act), against the judgment of the Election Tribunal of Bijnor, allowing an election petition filed by Ratan Lal Jain, (hereinafter called the respondent).

The dispute arises out of election to the U. P. Legislative Assembly from Constituency no. 51, known as Afzalgarh Constituency, situate in the district of Bijnor. Six persons sought the election from the above constituency. The polling took place on the 6th of March, 1957, and as a result of the counting of votes, which took place on the 10th March, 1957, Allah Bux, (hereinafter called the appellant), was declared as the duly elected candidate. Ratan Lal Jain, respondent in this appeal, decided to challenge the election of the appellant Allah Bux and sent an election petition, within the time allowed by law, to the Election Commission. The Election Commission sent it for trial to the

District Judge of Bijnor, who was appointed as the Election Tribunal to try and dispose of the election petition. The respondent had impleaded the appellant and one Banwari Lal as opposite parties to the election petition. The appellant was impleaded as the duly elected candidate and Banwari Lal as one of the candidates, who had committed certain corrupt practices. In the election petition three grounds were taken, namely, that the appellant was disqualified from being chosen as a member of the Legislative Assembly in view of the provisions of section 7 (d) of the Act, that the appellant, along with his relations, workers, supporters and agents, had committed corrupt practices of undue influence, bribery and systematic appeal to the electors to vote for him on the ground of his community and religion. The third charge was that Banwari Lal, opposite party in the election petition, had been bribed by the appellant in order to induce Banwari Lal to stand as a candidate at the election. Both the appellant and Banwari Lal contested the election petition, but on the 31st July, 1957, the learned counsel for the respondent, *Ratan Lal Jain*, made a statement before the Tribunal that he did not propose to press the grounds relating to the commission of the different kinds of corrupt practices and that he would confine his case to the first ground, mentioned above. On this statement being made, it became unnecessary to continue Banwari Lal as a party to the election petition, and the Election Tribunal consequently passed an order the same day striking off the name of Banwari Lal from the array of opposite parties in the election petition, and Banwari Lal was awarded his costs, which he had incurred till that date. The election petition then proceeded only against the appellant and only on the first ground.

The ground is set out in paragraph 4 (a) of the election petition and it is to the effect that the appellant was disqualified from being chosen as a member of the U. P. Legislative Assembly, because he, along with his brothers Ali Husain and Kifayatullah and his uncle Inayatullah and other members of the family, jointly

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carried on business in the name of Messrs. Azmatullah Inayatullah, and the business was of purchasing at auctions timber and bamboos from the Forest Department of the U. P. Government and supplying sleepers, prepared out of the timber, to the U. P. Government. The appellant was said to have a share, as well as interest, in the contract for the supply of sleepers to the Government, and it was pleaded that the appellant was disqualified from being chosen to the U. P. Legislative Assembly because of the provisions of section 7 (d) of the Act.

The above facts, if proved, would establish the ground for declaration of the election of the appellant to be void under section 100 (1) (a) of the Act. The appellant, in his written statement, denied that he had any share or interest of the contract for the supply of goods or for the execution of any works or the performance of any services undertaken by the State Government, that he had no interest in the timber and fuel business carried on by the firm Azmatullah Inayatullah, that the appellant's brother Ali Husain and his uncle Inayatullah only purchased the right to cut trees from Government forest, but even they had not entered into contract of any kind for the supply of sleepers to the U. P. Government, and that the appellant himself had never even purchased the right to cut trees from the Government forest and had not carried on this business individually or in partnership with anybody else. He alleged that his only business was agricultural farming. As a result of the pleadings, the Election Tribunal framed the following issue, which is the only issue relevant for the purpose of the appeal.

Issue no. 1—"Was respondent no. 1 Sri Allah Bux disqualified under section 7 (d) of the Representation of the People Act, 1951, for being chosen as a member of the U. P. Legislative Assembly? If so, its effect?"

Before proceeding to consider the oral and documentary evidence, we might mention the admitted facts of the case. The admitted facts only are that Azmatullah and Inayatullah were two brothers and Azmatullah died in December, 1946, leaving three sons, Allah Bux

(appellant), Kifayatullah and Ali Husain. Before December, 1946, Azmatullah and Inayatullah carried on the business of purchasing and selling timber and other commodities under the name and style of Azmatullah Inayatullah. The case of the appellant is that, after Azmatullah's death, the partnership between the two brothers came to an end; but his case as to who were the persons who continued to work under the style of Azmatullah Inayatullah has varied from time to time. According to the written statement, only the appellant's uncle Inayatullah and his brother Ali Husain carried on the business of purchasing timber from Government forest at public auctions, which would go to suggest that both Inayatullah and Ali Husain continued to do the said business jointly. But, on the date of issues the appellant's counsel made a statement that neither the appellant nor his brother Ali Husain had any interest or share in the business carried on under the name and style of Azmatullah Inayatullah. It was further stated that even Ali Husain was not a Government forest contractor in 1956-57, but was simply a bidder at public auctions and he also never entered into any contract with the U. P. Government for the supply of sleepers. The appellant was said to have had no concern with the forest business of his brother Ali Husain.

The respondent realized in time the importance of the account books of the firm Azmatullah Inayatullah and before evidence was produced in the case, he applied to the court for the issue of a commission for taking possession of the account books of the firm. This application was allowed and the Commissioner went to the shop, where the business was carried on, and succeeded in obtaining possession of the account books of the firm for the years 1955-56 and 1956-57. The respondent was also able to find out the contracts entered into between Ali Husain and the Forest Department of the U. P. Government for the purchase of timber and for the supply of sleepers to the Government. In view of this evidence, it was no longer possible to deny that Ali Husain, brother of the appellant, had entered into

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contracts for the supply of sleepers to the U. P. Government. So the position taken up at the time the evidence was produced in the case was that Ali Husain had become the sole proprietor of the firm Azmatullah Inayatullah, after the death of Azmatullah, and that, in lieu of the acquisition of this sole ownership, Ali Husain gave a sum of Rs.5,000 as compensation to the other partners of the firm. The case of the appellant, as disclosed from the evidence produced by him, mainly was that he was not a partner and had no interest in the business, which was still carried on by his brother Ali Husain in the name of Azmatullah Inayatullah. In order, however, to see whether the respondent has been able to establish the ground of disqualification set up in the election petition, we shall have to consider whether all the ingredients set out in section 7 (d) of the Act have been fully proved by the respondent. The respondent has to establish—

- (1) Whether the firm Azmatullah Inayatullah had a contract for the supply of sleepers, which contract subsisted on the relevant dates?
- (2) Whether the appellant had a share or interest in the said contract for the supply of sleepers?
- (3) Whether the contract had been entered into either by the appellant himself or by any other person, that is, Ali Husain, for the benefit of the appellant? and
- (4) Whether the contract was for the supply of sleepers to the U. P. Government?

Before entering into the discussion on the points, mentioned above, we may deal with the contention of the learned counsel for the appellant that paragraph 4 (a) of the election petition did not contain any averment to the effect that the appellant was a partner in the business. We are unable to accept the contention. What the respondent stated in the said paragraph is that the appellant, his brothers Ali Husain and Kifayatullah,

and his uncle Inayatullah along with other members of the family—

“carry on business jointly in the name of Messrs. Azmatullah Inayatullah”

and it has further been stated that the appellant has a share as well as an interest in a contract for the supply of goods to the U. P. Government. It is true that it has not been stated in so many words that the concern known as Azmatullah Inayatullah is a firm and that the appellant is a partner in the firm. What has been stated is that all the members of the family, including the appellant, carry on the business jointly in the name of Messrs. Azmatullah Inayatullah. The family, which is said to be carrying on the business in the name of Messrs. Azmatullah Inayatullah, is a Muslim family and the business is said to be carried on jointly by this family. The case thus cannot be a case of any business being carried on by any joint Hindu family and the facts stated necessarily lead to the conclusion that the concern Azmatullah Inayatullah is nothing else but a firm, and those persons who jointly carry on the business of this firm must necessarily be partners of the firm. As a matter of fact, clause (d) of section 7 of the Act nowhere mentions a “firm” or a “partner” in a firm, and the omissions, therefore, to use the above two words in paragraph 4 (a) does not, in any way, show that the pleading contained in this paragraph does not disclose a charge as mentioned in the clause. It has been stated in the paragraph that the appellant has a share as well as interest in a contract for the supply of goods to the U. P. Government and this averment, taken along with the allegation that the family of the appellant carries on the business jointly in the name of Azmatullah Inayatullah as forest contractors, is sufficient for making out a pleading for the charge under section 7 (d) of the Act. We think that the pleading contained in paragraph 4 (a) contains sufficient facts which were required to be stated in order to make out the charge and in order to give notice to the appellant of the precise charge which the appellant had to meet.

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The learned counsel then contended that the issue that was framed was not sufficiently clear and did not bring out what facts were actually to be proved or disproved. The issue no. 1, which we have already quoted, only poses a question whether the appellant was disqualified under section 7 (d) of the Act for being chosen as a member of the U. P. Legislative Assembly, but all the required facts were stated in the pleading and before the Election Tribunal no objection appears to have been raised that the issue does not mention the exact facts which were required to be proved or disproved in the case. No such ground has been taken in the grounds of the appeal either, which are quite detailed and are as many as 25 in number. The contention has no substance in it and it is also not open to the learned counsel to put forward this contention now, in view of the fact that no such ground has been taken in the memorandum of appeal.

We now proceed to discuss the points mentioned by us above.

Point no. 1—"Whether the firm Azmatullah Inayatullah had a contract for the supply of sleepers, which contract subsisted on the relevant dates?"

Before proceeding to discuss the evidence on the point, it may be mentioned that the case originally set up in the written statement in paragraph 8 (1) (a) was that Inayatullah and Ali Husain purchased—

"areas of the Government forests in public auction which any person is entitled to do, but there has been no contract of any kind either for the supply of sleepers to the U. P. Government or otherwise."

The appellant denied any connexion of his with this business and, as far as his uncle and brothers are concerned, he stated that they also had not taken any contract for the supply of sleepers to the U. P. Government, but had merely purchased the wood of the Government forest at public auctions. The learned counsel for

the appellant added on the date of the framing of the issue viz., on 31st July, 1957, that even Ali Husain had no interest or share in the business which was carried on under the name and style, Messrs. Azmatullah Inayatullah. But this position had subsequently to be given up and an application was made on 31st October, 1957, by the appellant stating that his counsel had wrongly made this statement and that he had not been instructed to state the above facts. In his statement before the Election Tribunal, the appellant stuck to what he had said in the application, but the real reason why this part of the case was given up appears to be, as already stated, that the account books of the firm for the year 1955-56 and 1956-57 had been taken possession of by the Commissioner under the orders of the court, and the other evidence which the respondent was able to collect clearly established that Ali Husain really had entered into contracts for the purchase of wood and the supply of sleepers. During their statements in court, the appellant and his brother Ali Husain have both admitted, that Ali Husain did enter into the two contracts, mentioned above, with the Forest Department of the State of Uttar Pradesh and that Ali Husain was the proprietor of the concern Azmatullah Inayatullah. They have stated that, after the death of Azmatullah in 1946, a family arrangement was arrived at by which Ali Husain paid a sum of Rs.5,000 to the other heirs of Azmatullah and thence forward he carried on the business in the old name and style, as the sole proprietor of it. We shall consider the correctness of this part of the case of the appellant while considering the evidence on Point no. 2.

The fact that Ali Husain entered into a contract with the U. P. Government for the purchase of wood of a part of the forest and for the supply of sleepers to the U. P. Government is conclusively established by the two contracts which were entered into by him with the Forest Department of the U. P. Government on the 24th September, 1956. One of the contracts is for the purchase of wood in the forest and it is marked Ex. 11, and the other is for the supply of sleepers and is marked

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Ex. 10. Both these contracts bear the signatures of the Divisional Forest Officer and of Ali Husain and purport to have been entered into between Ali Husain, son of Azmatullah, on the one part and the Governor of Uttar Pradesh on the other. Ex. 11 is the contract for the purpose of wood for a sum of Rs.23,300, and one of the terms of this contract is that all the wood shall be cut and removed from the area specified in the contract by the 31st March, 1957, unless the time is extended by some officer of the Forest Department. The contract thus for the purchase of the wood continued to be in force at least till the 31st March, 1957 that is, till after the date of the declaration of the result.

The contract for the supply of sleepers is marked Ex. 10 and it provides for the supply of sleepers by the 28th February, 1957, after having been examined by the officers of the Forest Department, and if some sleepers had been rejected, they were to be supplied by the 15th March, 1957. It was further provided in paragraph 8(A) of the contract that the sleepers prepared for the Railway shall be sold through the Forest Department only. Ex. 10 is clearly a contract for the supply of sleepers to the U. P. Government and it was admittedly entered into by Ali Husain.

P. W. 1, Sri Vijai Bahadur was the Divisional Forest Officer of Kaligarh Forest Division and he has stated that he was posted in the division in November, 1955. The practice is that the forest is divided into different areas and the wood of the different areas is then auctioned and each area is called a lot. Before the auction a list of the lots is prepared. A separate list is prepared containing the number of sleepers which are to be supplied by the purchaser of each lot. The purchaser is bound to supply the number of sleepers in accordance with the list allotted to the lot. The area purchased by Ali Husain was numbered as lot no. 28, and the purchase was made by him on the 24th September, 1956. The bid of Ali Husain was the highest, amounting to a sum of Rs.23,300 and the auction of the lot was accordingly concluded in favour of

Ali Husain. The witness filed the original agreement entered into between Ali Husain and the U. P. Government, which is dated the 24th September, 1956. The other agreement was with respect to the supply of sleepers and both these agreements were signed by Ali Husain as contractor and J. R. Singh, Conservator of Forests on behalf of the U. P. Government. He has further stated that unregistered firms are not permitted to make a bid for the purchase of the lots, and the lots are sold only to individuals or to registered firms. This fully explains the reason why the name of the firm Azmatullah Inayatullah is not mentioned in any of the two contracts, and the name of the contractor is shown as Ali Husain. It is admitted that the firm Azmatullah Inayatullah has not been registered under the Partnership Act or under any other law. This witness fully proves the two contracts mentioned above, the execution of which is further admitted by Ali Husain himself.

A copy of the note of the bids taken at the time the lot was auctioned has been filed and is marked Ex. 4. It gives the bids of four persons including the bid of Ali Husain, and the bid of Ali Husain was the highest, being for the sum ultimately of Rs.23,300.

P. W. 4 Sri Dutt Pandey was the Head Clerk of Kaligarh Forest Division and he has stated that the two contracts, mentioned above, were signed by Ali Husain in the presence of the witness. He fully proves the two contracts, which were marked Exs. 10 and 11. P. W. 2, Sri A. N. Chaturvedi was the Assistant Conservator of Forests, Kaligarh Division, and it was his duty to examine and pass the sleepers supplied by the purchasers of the different lots in the division. He says that after the sleepers have been examined by him, his clerk prepares a provisional note after the inspection. He proves the inspection note prepared on the occasion when the sleepers supplied by the purchaser of lot no. 28 were examined by him. The note further is to be signed by the contractor or his agent. The provisional note prepared with respect to the inspection of the sleepers supplied by the purchaser of lot no. 28 is dated the 12th March, 1957, and on this date the sleepers were examined

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list of the number of sleepers to be supplied by the purchaser of each list is separately prepared. The purchaser of the lot is bound to supply sleepers in accordance with this list. The scheme appears to be that the wood of a particular area is sold, but the purchaser of it is under an obligation to supply a certain number of sleepers, which are expected to be prepared out of the timber growing in the area. The two contracts for the purchase of the wood and the supply of sleepers were entered into on the same day and it is not denied on behalf of Ali Husain, witness for the appellant, that the essential condition of the purchase of the lot was a supply of the specified number of sleepers, as mentioned in the list prepared by the Forest Department. The contract for the purchase of the lot is dependent on the contract for the supply of sleepers and the two contracts, under the circumstances of the case, must be held to form part of the same transaction. The Election Tribunal has noted the fact that the question, whether Ali Husain had signed the two contracts for the purchase of wood and supply of sleepers, was put thrice to the witness. It was then that the witness replied that these papers might be bearing his signatures. It is after this that he admitted his signatures on the two contracts and also admitted the fact that he had supplied sleepers to the Government according to the contract in March, 1957. In their statements none of the witnesses of the appellant took up the position that the firm Azmatullah Inayatullah took the contract for the purchase of wood but not for the supply of sleepers to the U. P. Government. In fact, Ali Husain had to admit that he signed both these contracts and the contracts admittedly bore the same date. We have thus no hesitation in holding that the firm Azmatullah Inayatullah had not only taken up the contract for the purchase of wood of the lot but had also taken the contract for the supply of sleepers to the U. P. Government according to the list prepared by the Forest Department. The appellant was elected on 10th March, 1957, the sleepers were supplied on the 12th March under the contract and the purchase was made long after this. Under the circumstances, the disqualification would attach to

the appellant, if he was a partner of this firm according to the law laid down by the Supreme Court in the case of *Chaturbhuj Vithaldas Jasani v. Moreshwar Parashram* (1).

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This brings us to the next point.

Point 2—“Whether the appellant had a share or interest in the said contract for the supply of sleepers?”

We have already held above that it has been proved in the case that the firm Azmatullah Inayatullah had a contract for the purchase of the wood in lot no. 28 and also entered into a contract for the supply of sleepers to the U. P. Government. This contract was for the year 1956-57 and the sleepers under the contract were supplied to the U. P. Government on the 12th March, 1957, after the declaration of the result of the election.

The most important evidence of the fact that the appellant was a partner in the firm Azmatullah Inayatullah is afforded by the three documents concerning assessment proceedings for 1955-56 under the U. P. Sales Tax Act. The first document is the assessment order, Ex. 9, passed by the Sales Tax Officer of Bijnor on the 25th May, 1956, with respect to the assessment year 1955-56. Ex. 44 is the return of sales tax for this year submitted to the Sales Tax Officer, and Ex. 48 is the statement of Allah Bux appellant himself, made to the Sales Tax Officer, in the course of assessment proceedings for the above year.

The learned counsel for the appellant argued that these three documents were excluded from evidence by the provisions of section 23 of the U. P. Sales Tax Act, 1948. Sub-section (1) of the section is important and it is as follows:

23. (1) “All particulars contained in any statement made, return furnished, or accounts or documents produced in pursuance of the provisions of the Act or of any rules made thereunder, or in any affidavit given or

(1) 9 Election Law Report. 301

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affidavit or deposition made in the course of any proceedings under the Act or the rules made thereunder, or in any record of any proceedings relating to the recovery of a demand, prepared for the purpose of the Act or the rules made thereunder, shall be treated as confidential.

Sub-section (2) permits disclosure of certain particulars which are enumerated in clauses (i) to (iv) of the sub-section. A reading of this sub-section shows that the sub-section directs that the matters enumerated in it shall be treated as confidential. There are particulars contained in any statement made or return furnished in the course of any proceedings under the Act or the rules or in the record of any proceedings relating to recovery of a demand, as well as certain other papers with which we are not concerned. The argument of the learned counsel is that the statement made by the appellant before the Sales Tax Officer and the return furnished to him are directed to be treated as confidential, which necessarily means that no court is permitted to take the above documents into evidence or to ask the Sales Tax Officers to file them or their copies in court. He also says that as far as the assessment order goes it is a document produced under the provisions of the Sales Tax Act and has thus also been directed to be treated as confidential.

A comparison of the provisions of section 23 (1) of the U. P. Sales Tax Act with the provisions of section 54 (1) of the Indian Income Tax Act shows that there are two very important points of difference between the two sections, though the language of section 23 (1) of the Sales Tax Act appears to have been borrowed from section 54 (1) of the Indian Income Tax Act. The two important points of difference are that "section 54 (1) includes within it the particulars contained in any record of any proceedings," but these words have been omitted in section 23 (1) of the U. P. Sales Tax Act. The omission of the above words from section 23 (1) of the Sales Tax Act appears to be a deliberate one and the omission clearly shows that the intention of the Legislature was not to make the particulars

contained in the record of any assessment proceeding confidential. The assessment order, Ex. 9, thus does not come within the ambit of section 23 (1) of the Sales Tax Act at all and there is no direction to treat the said order as confidential. The reason for the difference in the two provisions of these two Acts appears to be that an assessment order passed by the Income-tax Officer exposes the real financial status of the assessee, whereas the assessment order under the U. P. Sales Tax Act would only show the value of sales and purchase made by the dealer in the particular year. The assessment order under the Sales Tax Act would show the amount for which business was transacted by the dealer, but other financial status would not appear from the assessment order. The Legislature probably considered that disclosure of the total amount for which the business was transacted in a particular year by a dealer did not really disclose his real financial status. What is the reason, a reading of the two provisions, mentions performance makes it quite clear that the omission of the words, quoted above, was a deliberate one.

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The second important difference between the two provisions is that in section 54 (1) of the Income Tax Act the Legislature, after saying that the documents mentioned in it shall be treated as confidential proceeds to say

“and notwithstanding anything contained in the Indian Evidence Act, 1872, no court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such documents or records, or to give evidence in respect thereof.”

The whole of the above sentence is to show section 23 (1) of the U. P. Sales Tax Act also, quoted that the prohibition contained in the above, has not been applied to the document mentioned in section (2) in section 23 (1) of the Sales Tax Act. The provisions as also of the Sales Tax Act contains certain

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does sub-section (3) of section 54 of the Indian Income Tax Act. In spite of the said exceptions contained in sub-section (3), section 54 (1) of the Indian Income Tax Act contains a clear direction to the courts not to require any public servant to produce before them the documents specified in the sub-section. The existence of similar exceptions in sub-section (1) of section 23 of the U. P. Sales Tax Act, therefore, does not have the effect that the direction to use the documents as confidential must necessarily mean that the courts should not accept evidence afforded by the documents enumerated in the sub-section, if they do not fall within the exceptions mentioned in sub-section (2) of section 23 of the Sales Tax Act.

The very fact that the Legislature, while enacting section 54 (1) of the Income Tax Act, in spite of the use of the word "confidential", considered it necessary to lay down the prohibition against the courts requiring a Tax Officer to produce the documents mentioned to be treated as confidential, shows that the mere use of the word "confidential" did not mean that the courts were barred from asking the officers of the department to produce the documents enumerated in the section before them. The same must be the position with respect to the use of the same words in an analogous provision of law contained in section 23 (1) of the U. P. Sales Tax Act. It appears that the direction contained in the two enactments for treating the documents mentioned therein as confidential is a direction to the officers of the two departments not to voluntarily disclose the contents of the documents, though they may supply their copies to outsiders. The Income Tax Act appears to prohibit from asking the said officers to produce the relevant documents before it, nor are the officers prohibited from disclosing the contents of the documents or from filing those documents in court. By the use of the word "confidential" had the effect of bringing about the result it would not be possible even for the assessee to produce such documents, though the provision is mainly to protect the interest of the assessee. There are a number of decisions of different courts holding that the use of the word "confidential"

did not debar the assessee from producing any of the documents mentioned in section 54 (1) of the Income Tax Act in a court of law. We might mention in this connexion two cases of this Court, namely :

Suraj Nain v. Jhabbu Lal (1) and
Naim Singh v. Tikam Singh (2).

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A Division Bench of the Bombay High Court in the case of *Emperor v. Usman Chotani*, (3), has ruled that in providing that the documents are to be treated as confidential, the Legislature only meant that they are to be treated by income-tax authorities as confidential and not that the documents were confidential in the hands of whoever's hands they might be and the section does not prevent an assessee from disclosing the contents of the documents referred to in section 54 of the Indian Income Tax Act.

A Full Bench of the Madras High Court in the case of *Ram Narayan v. Venkattaswami*, (4), has taken the view that the fact that the return of an assessee is to be treated as a confidential document does not mean that the assessee himself cannot obtain a copy of it for his own purpose.

For the above reasons we are unable to accept the contention of the learned counsel that the Election Tribunal was not authorized to take Exs. 9, 44, and 48 into evidence. The question was raised before the Election Tribunal also and it passed a considered order permitting the respondent to produce the documents concerning the sales-tax and income-tax. The Income-tax Officer, however, refused to permit the respondent to examine the Income-tax Officer or to have a copy of the documents concerning income-tax proceedings of the assessee produced in court.

We may now proceed to consider Exs. 44 and 48. Ex 9 is the order of the Income-tax Officer for the assessment year 1955-56. The assessee dealer is

(1) A. I. R. 1944, All. 114.
(3) A. I. R. 1942 Bom. 289.

(2) A. I. R. 1958 All. 388.
(4) I. L. J. Mad. 969.

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mentioned as "Azmatullah Inayatullah, Timber Merchant, Dhampur", and it is said that the dealer was represented by "Allah Bux (appellant) partner". In the body of the order it is stated that in response to the notice under the U. P. Sales Tax Rules to produce the account books of the firm, in order to verify the correctness of the return submitted, Allah Bux, partner of the firm, appeared on the 16th May, 1956. At two places it says that Allah Bux appellant is a partner in the firm Azmatullah Inayatullah. This is a public document and it contains entries which are relevant to the matter in issue before us. It is admissible under section 35 of the Indian Evidence Act. I need not say any reason why the Sales Tax Officer mentioned the fact that the appellant is a partner in the firm, if it had not been admitted before him. At least the manner in which this fact has been stated shows that there was no dispute concerning the fact that the appellant is that the sales tax return of the firm Sheikh Azmatullah Inayatullah for the year for which the tax was assessed was Ex. 9. It purports to bear the signatures of the appellant and also described the appellant either as proprietor, or partner or manager of the firm. In fact, the form is a printed one and the inappropriate description of the person signing the form was to be scored out. It was expected that two out of the three words, "proprietor", "partner" or "manager" would be scored out and the word denoting the appropriate description of the person signing the return was to be allowed to stand, but none of the words having been scored out, it is not possible to say that the Allah Bux appellant was described as partner or manager of the firm. The appellant denies having had anything to do with the return and this denial is proved to be wrong by Ex. 44. The respondent gave some signatures on the form and the form itself bore the signatures of the appellant, it appears, that the appellant wanted to avoid a handwriting expert, and in order to avoid a delay that this proceeding would have caused, the respondent made a statement on the 15th November, 1957, that for the purpose of this

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of the Madras High Court and, on the principle laid down in the case, it must be held that the Sales Tax Act is tax filed by an assessee under the U. P. Sales Tax Act is also a public document. Apart from section 35 of the Indian Evidence Act, we think this return of the sales tax is also admissible under section 1 of the Evidence Act, as it is the existence of the act in issue highly probable, and, even if this document is excluded from consideration, the evidence afforded by Ex. 48 conclusively contains the case of the respondent. It is a copy of a statement made by the appellant himself before the Tax Officer. It begins

"I, Allah Bux, son of Allah Inayatullah, Dham-dhama, of the firm Azmatullah, on oath :"

"At Bijnor, state of Punjab, assessment evidenced by statement refers to the early admitted that he was not the appellant has Allah Inayatullah. In the Tax Officer's firm Azmatullah, Azmatullah to be treated as a business", was assessed under Ex. 48 timber and besides this."

In fact, the appellant had no other sale and included the appellant description of the word "we" closer or a co-sharer in the scored out person who was a partner. The words "partner" for the appellant has a score.

The learned counsel for the appellant has argued that the statement is not admissible. The first paragraph according to him, this portion of the statement, because, witness, or his description, or evidence, though it is a part of the statement of the appellant, it is not a part of his deposition. He relies on the decision of the Privy Council in the case of *Pratt v. Ahmed Husain*. Their Lordships, while considering the leading of a signature, under the Code of Criminal Procedure, wanted to know the description of a witness in order to avoid a deposition was not a part of the deposition, the statement was not even a part of the evidence given on the 15th Nov. (1903-04) L. R. 31 I. A. 38

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by the witness on a solemn affirmation, and this portion may have been filled in by a subordinate official and may not have been read out to the witness by the Magistrate. In these circumstances, they observed that in assuming that there was no slip or accidental omission in the heading of the document, and assuming that the document was admissible in evidence, the document is not entitled to any weight.

We think that the position with respect to the description of the witness before recording statement under the Code of Criminal Procedure is different from the position that this document discloses. The statement in Ex. 48 expressly purports to be made by the appellant himself. The statement on oath begins after a few words, but as far as the admission contained in this portion is concerned, it is admissible in evidence, even though it was not on oath and had been made before an official was administered. The statement is also given by the appellant. The only explanation the appellant gives is that he never made any statement to the Tax Officer and that he had been sent to the prison by his brother Ali Husain, who was the Muni of the village and it was Shyam Singh who had made the statement, though the appellant signed it, at the time of the Sales Tax Officer. This explanation is unbelievable because there is no reason to suppose that if the statement was made by the appellant, he would not purport to be his statement and sign it to the appellant. We have no doubt that the appellant did not expect a man in the position of a Muni to be making a statement of the kind and at the same time such explanation. We unhesitatingly reject the explanation.

The above document also reveals that the appellant was a partner in the firm of Inayatullah in the year 1955-56 and a partner who furnished the return, that is, 31st March 1956, the date that he made the statement, i.e., wide

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The assessment for the year 1956-57 has not yet been completed and no useful papers regarding that assessment could, therefore, be filed. The appellant took up the case that he was never a partner in this firm after 1946. The case has been conclusively proved to be wrong and the contrary has been established. Section 109 of the Evidence Act is to the effect that when the question is whether the persons mentioned are partners and it is shown that they had been acting as such, the burden of proving that they are not partners or that they ceased to be partners lies on the person who says that he was not a partner or that he ceased to be a partner. The presumption, therefore, is that the appellant, who has been called as a partner, is in fact a partner. The appellant has to prove that he was not a partner or that he ceased to be a partner. Apart from the above, other circumstances also show that the appellant all along was a partner in the firm. The Tax Officer found still further evidence that the plot on which the forest was situated was marked as such by the Municipal Board. The appellant's share in the family of the appellant has been in possession of the family of the appellant since before 1946. In fact, the lease since before 1946 has been in the name of the appellant. The lease, every year and the lease ending on the 31st of March 1957, was in favour of the appellant. The words "the lease has been marked as such" are found in the lease. It is admitted that the lease is in the name of the appellant. The explanation of the appellant is that the lease is in his name, but it is a lease of wood that is transacted on the part of his brother Ali Husain. His signature is on the lease, which he has given to the Municipal Board. Apart from his statement, there is good evidence of the fact that he takes part in the management of the firm. On the other hand, the appellant has not shown that he has ever wanted to discontinue the account of the firm Azmatullah. There is also evidence of the fact that the appellant was President of the Town Area Committee. He has got his letter heads printed in which he

has styled himself as Government forest contractor. His explanation is that he got the letter head printed in 1953 and had taken some small contracts in that year and had, therefore, called himself a Government forest contractor. In his written statement he has stated that he has always been carrying the business of agricultural farming only. But in the statement he has said that in some of the years he had also purchased timber from Government forest. When confronted with these explanations, which had been proved, he came out with explanations. We do not find it possible to ascribe value to his explanations.

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The third circumstance is that the appellants jointly assessed to circumstances and property. Ali Husain and his suggestion is that it is the duty in the town areas to jointly witness persons even though the business of those persons is separate. It is also stated that the residents in the same house have been carrying on separate businesses also. He was a witness, who is Bakshi of the Town Area. Adil, and he went the whole length of his explanation and gave out his own dozen cases. Coming to him, the business is separate but the was joint. We have noted in so far as he says that the statement of the appellants in so far as he says that the Bakshi of the Town Area of which the appellants are the President also own it. His appointment as appellant. His statement is absolutely worthless.

We do not say that the three circumstances mentioned by us above are by themselves sufficient to show that the appellant is a partner in the firm. Inayatullah, but these do support the case of the appellant, which has been conclusively proved in the case of 48, mentioned above.

Coming then to the oral evidence, in the case, the appellant has produced P. Willal Gupta, Executive Officer of the Town Area, Dhampur. After proving the lease in favour of the appellant, he has also proved some evidence.

of the firm were written by Shiam Singh with whose handwriting the witness was well acquainted.

P. W. 9 Sri Balbir Singh says that he purchased three *burgas* of wood from the business firm of appellant and he produced the cash memo which has been marked Ex. It is a memo. for the value of wood worth Rs.4-8. The witness states that the business of the sale of timber on the land to the Municipal Board.

P. W. 10 Sheo Charan Lal, who pays Rs. income-tax and Rs.150 town area tax, states that he knows Inayatullah, Ali Husain and the appellant and that these persons live jointly and are joint in business. He says that all the three of them are forest contractors and they also own timber business in Dhampur, where their business concern is known as firm Azmatullah Inayatullah. He is also a member of the Town Committee of Afzalgarh and he says that it imposes joint tax on the appellant, Inayatullah, Ali Husain. He has proved assessments for many years on the above persons. In cross-examination he has admitted that he was also a candidate for election as Chairman of the Town Area Committee of Afzalgarh but the appellant was elected as the Chairman. He has admitted that the appellant Allah Bux shows income from the timber business at the sum of Rs. 1,250 in the year 1954-55 and the sum of Rs. 250 in the year 1955-56 for the purpose of assessment of the circumstance of property tax. He has admitted that Ali Husain, Inayatullah have a firm of their own and that he had never been to that firm. The witness was a joint candidate for election as chairman of the Town Area Committee of Afzalgarh in the election of 1954 but he does not think that that is a ground for rejecting the statement of the appellant. He is a respectable inhabitant of the locality and he knows whether the appellant is also engaged in the business of the firm Azmatullah Inayatullah.

P. W. 11 S. S. Singh has produced *khata* entries and handwriting of the respondent. The respondent has produced sufficient evidence.

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